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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

PHU DUC NGUYEN,

Petitioner,

v.

WILLIAM LOVE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I-A. During a jury trial of five codefendants, where the prosecutor and her lead investigator, Detective Baker, both impermissibly referred to "a redacted copy of the statement" of one of the codefendants, should not this conviction be reversed and any further prosecution be precluded because of the bad faith of the prosecution? Was Petitioner's Sixth Amendment right to confront witnesses against him under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), violated and these violations cannot be said to be harmless beyond a reasonable doubt?

I-B. Did not the prosecutor commit prosecutorial misconduct when she intentionally referred to a co-defendant's statement as being "redacted"?

II. Was it not ineffective assistance of counsel to stipulate that Petitioner had received a traffic violation ticket in a car used in the crime, when he denied this, without even checking that car's registration, which at post-sentence hearings clearly showed that Petitioner was not its owner? This question was *denied* in the Court of Appeals for the Third Circuit's opinion as to appealability, dated April 25, 2007, based on "Petitioner's arrest in the car with a participant in the crime, . . .". Respondents never claimed that Petitioner was arrested, only that a traffic citation was issued. The denial of appealability was restated in the Third Circuit's opinion.[1]

During Post-sentence hearings evidence was adduced from both Commonwealth of Pennsylvania and defense witnesses that it was not Petitioner who had received the ticket, but an unrelated person[2]. The issuing Officer could not identify Petitioner as the person to whom he issued the citation. Also, see section II, *infra*. Petitioner respectfully asks this Court to reconsider the denial of appealability, as well as the merits of this issue. Petitioner could not have been convicted without this stipulated ticket (especially if the prosecution had not effectively unredacted the none-testifying codefendant's statement.)

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[1] *Nguyen v. Love*, 2008 U.S. App. LEXIS 10844 (3d Cir. May 21, 2008).

[2] Appendix E, pp 70a-73a, copy of ticket and other defense exhibits from the post-sentence hearings.

LIST OF ALL PARTIES

Petitioner:

Phu Duc Nguyen

Respondents:

United States of America

William Love, Superintendent,
State Correctional Institution at Houtzdale

The Pennsylvania Attorney General

The District Attorney for Philadelphia County

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1. During a jury trial of five codefendants, where the prosecutor, and her lead investigator, Detective Baker, both impermissibly referred to "a redacted copy of the statement" of one of them, this conviction be reversed and any further prosecution precluded because of the bad faith of the prosecution. Petitioner's Sixth Amendment right to confront witnesses against him under *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Gray v. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), was violated and the violations cannot be said to be harmless beyond a reasonable doubt. The prosecutorial misconduct herein was irremedial. 5

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2. Petitioner, Phu Duc Nguyen, was deprived of his right to effective assistance of counsel guaranteed by the Sixth Amendment where trial counsel stipulate that Petitioner had received a traffic citation in a certain car, when he denied this, without even checking that car's registration, which at post-sentence hearings clearly showed that Petitioner was not its owner.

   This question was *denied* by the Third Circuit's Order granting appealability as to the issues argued relating to *Gray* and *Bruton*, dated April 25, 2007, based on "Petitioner's arrest in the car with a participant in the crime, . . .". It was never claimed by the Government that Petitioner was arrested, only that a traffic citation was issued. During Post-sentence hearings evidence was adduced from both Commonwealth and defense witnesses that it was not Petitioner who had received the ticket, but an unrelated person. The issuing Officer could not identify Petitioner as the person he issued the citation to. Petitioner respectfully asks this Court to reconsider the denial of appealability of this issue. 25

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The Order and Opinion of the United States Court of Appeals for the Third Circuit (case # 05-5285) denying petitioner's appeal entered on May 21, 2008. *Nguyen v. Love*, 2008 U.S. App. LEXIS 10844 (3d Cir. May 21, 2008). Appendix A, page 2a.

The Order of the United States District Court for the Eastern District of Pennsylvania, denying relief, dated October 28, 2005. Docket Number 04-CV-01665. Appendix B, page 9a.

The Report and Recommendation of the United States District Court for the Eastern District of Pennsylvania denying and dismissing. Appendix C, page 14a.

The Common Pleas Trial Court Opinion First Judicial District of Pennsylvania, Bill No. 97-07-0410 2/2. Appendix D, page 47a.

JURISDICTION

The United States Court of Appeals for the Third Circuit denied Mr. Nguyen's appeal (05-5285) on May 21, 2008 (Mandate Issued on June 12, 2008), after granting his certificate of appealability on April 25, 2007. This petition is timely. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution (Due Process Clause) provides, in pertinent part, that "No person shall . . . be deprived of . . . liberty . . . without due process of law . . ."

Amendment V to the United States Constitution (Double Jeopardy Clause) provides, in pertinent part, that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Amendment VI to the United States Constitution provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . have the assistance of counsel for his defense."

Amendment XIV to the United States Constitution provides, in pertinent part, that "No state shall . . . deprive any person of . . . liberty . . . without due process of law . . ."

STATEMENT OF THE CASE

This appeal arises from the denial, by the Third Circuit, of petitioner's case after granting him a certificate of appealability from the District Court's denial of petitioner's Habeas Corpus Petition pursuant to 28 U.S.C.A. § 2254.

Petitioner, Phu Duc Nguyen, was arrested on May 2, 1997, at his home in Philadelphia for a murder that occurred during a robbery on August 4, 1995 at a Philadelphia "massage parlor." There were several codefendants. Petitioner was supposed to have been the lookout. The Philadelphia Court of Common Pleas Docket Entries show that severance from the codefendants was sought and denied, and the Honorable Carolyn Engel Temin redacted the codefendants' confessions on May 18, June 2, and July 17, 1998. A jury trial with four of the codefendants before the Honorable James J. Fitzgerald, III, resulted in the conviction of felony murder (and related charges) and a life sentence. His Honor then denied post-sentence motions, which led to the state court appeal. After all state appeals were exhausted, the Habeas Corpus Petition was filed and subsequently denied, resulting in the Third Circuit appeal.

The procedural and factual history of this case at the trial level is outlined in great detail by the trial court in its Opinion, page 47a.

STATEMENT OF FACTS

Phu Duc Nguyen was arrested and charged with the offenses of Murder (for the killing of Mr. Todd Manga) and several counts of Robbery.

The defendant Phu Duc Nguyen and four co-defendants (Thanh Van Tran, aka, "Nghia", and, Loc Tran, and Hue Tri Phan, aka "Phan Hue, aka "Tony, and Quang Van Nguyen received a joint jury trial that concluded on March 1, 1999.

The jury subsequently found defendant Phu Nguyen guilty of Murder of the Second Degree, four counts of robbery, and Criminal Conspiracy (objective: to rob Jackie Kim and others, bill 0410, count 14).

The defendant received a sentence of Life Imprisonment for Murder of the Second Degree, and on April 19, 1999, the Court imposed a concurrent sentences of not less than 10 years, nor more than 20 years on the Conspiracy bill, and concurrent sentences of not less than 5 years, nor more than 10 years on the robbery bills.

Thereafter, post sentence motions and supplemental motions were filed, and on September 29, 1999, this court denied all post sentence motions. The within appeal followed. . . .

The homicide victim, Mr. Todd Manga, worked as a security guard at the massage parlor, which was managed by the robbery victim, "Jackie Kim". The three other robbery victims were young women who worked for Kim at the massage parlor.

Mr. Todd Manga was shot and killed when several of the defendant's confederates, acting in concert, surrounded him, while he was shot by one or two of them. Defendant, Phu Nguyen was not alleged to have been an actual "shooter", and his role in the criminal enterprise was to act as a "look-out." Appendix D, p. 47a

Your brief writer invites this Honorable Court to view the trial court's entire factual recitation. Appendix D, pp. 47a-62a. As will be seen *infra*, it is necessary.

REASONS FOR GRANTING THE PETITION

1. **During a jury trial of five codefendants, where the prosecutor, and her lead investigator, Detective Baker, both impermissibly referred to "a redacted copy of the statement" of one of them, this conviction be reversed and any further prosecution precluded because of the bad faith of the prosecution. Petitioner's Sixth Amendment right to confront witnesses against him under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), was violated and the violations cannot be said to be harmless beyond a reasonable doubt. The prosecutorial misconduct herein was irremedial.**

The fact that a redacted statement was read into the record immediately raises the issue of whether the redacted statement implicated the other defendants and violated the Confrontation Clause. However, the more pointed issue, and the issue that is one of first impression in our Nation's jurisprudence that your brief writer could find, is whether the prosecutor's unequivocal reference to the fact that the statement was redacted facially incriminates the co-defendants. Your petitioner has raised this Constitutional argument at every level from the trial court on.

The application of *Bruton*, *Richardson*, and *Gray* to redacted statements that employ phraseology such as "other individuals" or "another person" requires careful attention to both text and context, that is, to the text of the statement itself and to the context in which it is proffered. "The mere fact that the other defendants were on trial for the same crimes to which the declarant confessed is insufficient in and of itself, to render the use of neutral pronouns an impermissible means of redaction." *United States v. Molina*, 407 F.3d 511, 520 (1st Cir. 2005). However, a confession containing blanks "facially incriminates" the co-defendants and the use of such a confession, even if the evidence is coupled with a limiting jury instruction, is improper and a violation of the Confrontation Clause. *See Gray v. Maryland*, 523 U.S. 185, 192, 196 (1998).

The analysis of redacted statements and the accompanying conduct of the prosecutor and judge have been conducted extensively by courts in every circuit. However, at no point has a court analyzed a situation where, upon presentation of the redacted statement, the prosecutor unequivocally and deliberately referred to the statement as redacted. This behavior is the functional equivalent of presenting the jury with an unredacted statement; a *Bruton* error has clearly ensued.

Currently, the law in the Third Circuit is that a co-defendant's statement must be redacted "carefully" and be accompanied by appropriate jury instructions. *See Preister v. Vaughn*, 382 F.3d 394, 401 (3d Cir. 2004), *cert. denied*, 543 U.S. 1093 (2005) (stating that since a trial court redacted a statement "carefully" and because it "gave appropriate limiting instructions," the defendant's Sixth Amendment rights were not violated). The goal of the 'careful' redactions is to comply with the holding in *Gray*, which states that the redacted statement cannot contain blanks or other indications of redaction.

Here, the prosecutor and detective deliberately referred to the statement as redacted several times during the trial. The Third Circuit has already indicated that when deciding whether a *Bruton* error has occurred, the relevant inquiry is whether the jury realizes that a statement has been redacted. *See Mason v. Kyler*, 156 Fed. Appx. 452, 455 (3d Cir. 2005) (considering that "the jury may not have even realized [the phrase] was a redaction" when determining whether a *Burton* error occurred).

In *Mason*, the court did not hold that a *Bruton* error occurred. However, this was due to the nature and character of the allusion to the statement as redacted. There, the prosecutor properly redacted the statement, and simply alluded to the fact that the statement was redacted in a fleeting statement uttered during the closing argument only. In the instant case, the prosecutor unequivocally informed the jury that the statement was a redacted statement, and this fact, unlike the fleeting statement from *Mason*, was actual evidence, since the detective held up the redacted statement right after the prosecutor asked, "do you have the redacted statement?" *Infra.* The facts in the instant case are clearly improperly prejudicial and distinguishable from the behavior in *Mason.*

A number of other circuits have concentrated upon whether the jury knew that the statement was previously redacted when the statement was read into evidence. The law in the Eighth Circuit is that the prosecutor is free to use redacted statements, so long as the redactions are non-obvious and the jury would have to assume that the redacted statements were the actual words of the original speaker. *See United States v. Logan*, 210 F.3d 820, 823 (8th Cir. 2000) (stating that, "[f]or all the jury knew, these were [the co-defendant's] actual words, not a modified version of them"). In fact, the Eighth Circuit actually requires that the redactions are "seamlessly woven" into the statement such that the jury could not realize that the statement had been redacted. *See United States v. Williams*, 429 F.3d 767, 774 (8th Cir. 2005) (stating that the multiple use of the pronoun "someone" had "lost its anonymity by sheer repetition").

The Court of Appeals of the Fourth Circuit also concentrated upon whether the jury actually knows that the statements have been redacted. *See United States v. Halteh*, 224 Fed. Appx. 210, 218 (4th Cir. 2007) (stating that a *Bruton* error had not occurred because, in part, "it would have been unclear to the jury that the statements had been altered at all").

The law in the Sixth Circuit is that even a "logical blank" within a redacted statement is sufficient to invoke a *Bruton* violation, even if the names of the codefendants and all references to their existence have been removed from the statement. *See United States v. Gonzales-Garcia,* 73 F. Supp. 2d 819, 822 (W.D. Mich. 1999) (stating that "[n]o reasonable juror could hear . . . this redacted statement [with logical blanks] without understanding that someone's name was being kept out").

In the District of the Virgin Islands, the court has explicitly held that **if the jury hears statements that clearly indicate that the statements have been redacted, a *Bruton* violation has occurred.** *Virgin Islands v. Bryan,* 334 F. Supp. 2d 822, 830 (V.I.D.C. 2001) (stating that "the government's second set of redactions failed to adequately protect the Sixth Amendment rights of the codefendants because the statements would clearly indicate to a jury that they had been redacted").

In the instant case, no juror could possibly assume that the statement read into evidence constituted the actual words of the original speaker, since the prosecutor made certain of that by deliberately referring to the statement as redacted. In fact, she went as far as to ***ask the witness whether he had a copy of the redacted statement, at which point the witness held up the statement and read it into evidence.*** This is clearly sufficiently egregious to cause the jurors to come to the obvious conclusion that something was left out of the statement. Once the witness read that the crime was committed by the person who gave the confession along with "his friends" and "the other guy", it was no leap of logic to assume that the names of the co-defendants were the portions affected by the redaction, and the jury had to have recognized that the redactions referred to the co-defendants. Therefore, the chain of events surrounding the redacted confession constituted error under *Bruton and Gray*, notwithstanding the fact that the actual names of the co-defendants had been deleted and replaced with neutral pronouns.

The standard of review for denial of motion for severance is abuse of discretion. *See United States v. Gonzalez*, 918 F.2d 1129, 1137 (U.S. App. 1990). Prejudice is the touchstone of a motion for severance. While the denial of severance is left to the sound discretion of the trial court, the "defendant bears the burden of demonstrating that he or she has been prejudiced" if a joint trial proceeds. *United States v. Merlino*, 2000 U.S. Dist. LEXIS 3049, *16 (E.D.Pa. 2000). *Petitioner* met that burden here, but was forced to repeatedly move the trial court for mistrials based on this issue.

Deciding whether to grant a defendant's severance motion, the court "should balance the public interest in joint trials against the possibility of prejudice inherent in the joinder of defendants." *See United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991). In *United States v. Zafiro,* the Supreme Court stated severance should be granted, "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. 534 at 538-39 (1993). "Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." *Id.* at 539.

Whether a defendant may be actually prejudiced may depend on the likelihood that "the jury will have the capacity to 'compartmentalize' the evidence adduced". *See United States v. Sebetich*, 776 F.2d 412, 427 (3d Cir. 1985) (internal citations omitted). For example, where many defendants are tried together in a complex trial and the defendants have markedly different degrees of culpability and evidence against them, the risk of prejudice is heightened. *See Zafiro*, 506 U.S. at 539. The relevant inquiry regarding "compartmentalization" is whether it is within the jury's capacity to follow the trial court's instructions requiring separate consideration for each defendant and the evidence admitted against him or her. *See* 25 *James Wm. Moore et al., Moore's Federal Practice* 3d § 608.03(3); *U.S. v. Merlino*, 2000 U.S. Dist. LEXIS 3049 (E.D. Pa. 2000) (stating that "[w]hether a defendant may be actually prejudiced may depend on the likelihood that jury will have the capacity to 'compartmentalize' the evidence adduced"); *United States v. Johnson*, 297 F.3d 845 (9th Cir. 2002) (considering whether "the sheer size of the trial was manifestly prejudicial because it left the jury unable to compartmentalize the evidence"). *See also*, argument 2, *infra*. Here the **repeated** redaction violations prevented this, effectively destroying the purpose of redaction, and violating *Petitioner*'s rights to Confrontation, Due Process, and a fair trial.

"Motions for severance are within the sound discretion of the trial" court. *United States v. Reicherter*, 647 F.2d 397, 400 (3d Cir. 1981). The court should deny a request for severance "as long as the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants' and notwithstanding that the evidence against one codefendant is more damaging than that against another." *United States v. Jackson*, 649 F.2d 967, 973 (3d Cir. 1981) (internal citations omitted). Such was not possible here, particularly with the redaction violations. A mistrial should have been granted when the prosecutor flagrantly violated *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). In *Gray*, this Honorable Court categorically prohibited "indications of redaction" in statements admitted into evidence of non-testifying codefendants as herein, where two such confessions were admitted at Petitioner's trial. *Gray*, 118 S. Ct. 1157, 140 L. Ed. 2d 304; (N.T. 2/16/99 128; 2/17/99 68; and 2/18/99 15). The use of "other guys" and "my friends" violates *Gray*. However, beyond all question, the **prosecutor's brazen references to "a redacted copy of the statement"** in the presence of the jury unequivocally does.

On direct examination of Detective Augustine in front of the jury, she asked him (N.T. 2/16/99 130) "Do you have a redacted copy of the statement?" The Detective said that he did. Immediate objection and motion for mistrial were denied. *Id.* at 130-135. Incredibly, during subsequent cross-examination, the same detective asked counsel, *id.* at 153, "Is this under the redacted version?" Defense counsel intervened and the judge admonished the detective. *Id.* at 153-154. These repeated violations of *Gray* and *Bruton* denied Petitioner his right to confrontation under the Sixth

Amendment as made applicable to the states through the Fourteenth Amendment of the United States Constitution, and Article I, Section 9 of the Pennsylvania Constitution. Bad faith was the hallmark of this prosecution.

Had severance been granted, as sought pretrial, this would not have occurred. Petitioner gave no statement. Furthermore, **Petitioner's last name is Nguyen and the codefendant whose confession was being introduced during the above occurrence also had the same last name**, *id.* at 136, Nguyen, though he is no relative of Petitioner's. The jury during deliberations, after a six-week trial, may have confused these foreign names and believed that Petitioner had confessed. A severance would have avoided this. The docket entries of the trial court show that on May 18, June 2, and July 17, 1998, severance was denied and the two confessions were redacted. This was just after *Gray* was decided on March 9, 1998.

Severance having been denied, a fair trial minimally required the prosecutor's scrupulous adherence to *Bruton* and *Gray*. That her violation of it was intentional is undeniable by her own words during the mistrial argument as follows: "Your Honor, in order for a detective to get on the stand and tell the truth, **he has to at least be able to say that this is a redacted statement**." *Id.* at 131 (emphasis added.) This was unmitigated prosecutorial misconduct. This seasoned prosecutor made a conscious decision to unredact the statement and violate *Gray*. It was bad faith, and the resulting verdict cannot be allowed to stand and further prosecution barred.

In *Gray*, this Honorable Court analyzed *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), holding, concisely stated, there can be no clear indication of redaction. *See* discussion, 118 S. Ct. at 1154-1156, 140 L. Ed. 2d at 299-302, holding in part:

> In deciding whether *Bruton's* protective rule applies to the redacted confession before us, we must consider both *Bruton*, and a later case, *Richardson v. Marsh*, 481 U.S. 200 (1987), which limited *Bruton's* scope. . . .
>
> We therefore must decide a question that *Richardson* left open, namely whether redaction that replaces a defendant's name with obvious indication of deletion, such as a blank space, the word "deleted," or a similar symbol, still falls within *Bruton's* protective rule. We hold that it does.
>
> *Bruton*, as interpreted by *Richardson*, holds that certain "powerfully incriminating extrajudicial statements of a codefendant"—those naming another defendant—considered as a class, are so prejudicial that limiting instructions cannot work. *Richardson*, 481 U.S. at 207; *Bruton*, 391 U.S. at 135. Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the *Bruton* Court

found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result.

For example, a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. This is true even when the State does not blatantly link the defendant to the deleted name, as it did in the instant case by asking whether Gray was arrested on the basis of information in Bell's confession as soon as the officer had finished reading the redacted statement. Consider a simplified but typical example, a confession that reads, "I, Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not likely fool anyone. Keen jurors that watch TV are familiar with criminal law would know immediately that the blank, in the phrase "I, Bob Smith, along with , robbed the bank", refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not

> to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime. *Id.*

Putting aside the prosecutorial misconduct described above in the instant case, the redaction method used herein also left clear indication of redaction. Therefore, it failed to satisfy the standard set forth in *Gray*. Codefendant Quang Van *Nguyen*'s nine-page statement of October 23, 1997, was recounted to the jury by Detective Augustine (N.T. 2/16/99 128). This codefendant's statement, as read to the jury, substituted the term "guy" or "guys" for the real names of the codefendants on trial (N.T. 2/16/99 138-141). A cooperating codefendant, not on trial, Minh *Nguyen* (a third defendant named Nguyen, none related to the other), had testified as a Commonwealth witness (N.T. 2/10/99 130-233 and 2/11/99 6-245). He also was not a relative of Quang Van Nguyen's (*id.* at 6). However, Minh Nguyen's name was left in throughout the statement (N.T. 2/16/99 138-141). This corroborated Minh's prior testimony.

The statement as read said (*id.* at 138): "On the day that it happened I was with my friends. . . . Minh . . . and another guy had guns. . . . Minh and the other guys came into the bar." Then it explains how they went and did the instant crime. Only a dunce would not realize that the statement had been redacted. In his statement, Quang Nguyen said that he was with his friends. The name of Minh, who testified for the Commonwealth, was left in the statement, but the other friends were called a "guy" or "guys." The four other codefendants clearly were those guys not only because Minh so testified but also because they were Quang's friends. Nobody was fooled. Redaction was a farce. *Gray* was betrayed since the Confrontation Clause was dishonored. Petitioner could not confront and cross-examine Quang Nguyen who did not testify about his "friends" the "other guys" and to which of the codefendants were the references, if not to all of them.

This holds true for Quang's seven-page statement of October 27, 1997, which Detective Baker read to the jury (N.T. 2/17/99 starting at 68). The term "other guys" is used though Quang Nguyen says they are his friends who play cards together everyday in the park (*id.* at 76-77). Minh Nguyen's name is left in the statement (*id.* at 78, 79, 82). The redacted statement reads that (*id.* at 79) "one guy drove me" and other guys did other things. It is clear that these guys are his friends. That they are not identified allow the jurors to infer that they are the codefendants or some of them, and that some rule of evidence is in play to keep this from them, but it does not.

This pattern is repeated with codefendant Thanh Van Tran's statement. Neither did he testify and thus could not be cross-examined. His six-page statement of April 28, 1997, was recounted to the jury by Detective Baker (N.T. 2/18/99 starting at 15). Not only was the term "other guys" used as doing the crime, but also there was a specific reference to *three* other guys joining the first group after coffee at the crime scene (N.T. 2/18/99 22) but before the crime. Minh's name again was left in the statement to corroborate his testimony for the prosecution.

Reference to three other guys, in addition to Minh Nguyen and Thanh Van Tran, had to focus the jury on his codefendants sitting beside him at the defense table. Over the two preceding days, the jury had heard codefendant Quang Nguyen's statement interchangeably use "friends" and "guys" so that it was clear the "guys" were his friends, who were not identified explicitly, but inference allowed that they were the codefendants. Use of "other guys" in Thanh Van Tran's statement, coming on the heels of Quang Nguyen's statement, reinforced this inference and result in the denial of Petitioner's Sixth Amendment right of confrontation.

Gray repeatedly was cited and reaffirmed in *Lilly v. Virginia*, 119 S. Ct. 1887, 1896, 1899 (1999). This reaffirmation was of the principles for which *Gray* stands. *Lilly* did not involve redaction but the judgment of the Virginia Supreme Court in this capital murder and death sentence case was reversed with direction by this Honorable Court "to the Virginia courts to consider in the first instance whether this Sixth Amendment error was 'harmless beyond a reasonable doubt.'" 119 S. Ct. at 1901 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed. 2d 705 (1967)).

Lilly was found dispositive by the Pennsylvania Supreme Court in *Commonwealth v. Young*, 748 A.2d

166, 189 (Pa. 2000). The original Opinion was from January 22, 1999, upon reargument, the final Opinion is from March 24, 2000. In *Young,* the murder conviction and death sentence were reversed after reargument, and a new trial was ordered in light of the new holding, *id.* at 192, in *Lilly,* which was applied by the Pennsylvania Supreme Court for the first time. The improper admission of non-testifying codefendants' statements was not harmless beyond a reasonable doubt. *Id.* at 193-194. Again, no redaction was involved. The Confrontation Clause of the Sixth Amendment of the United States Constitution was found to be paramount. It is this Clause, which is the heart and soul of redaction.

In *Gray,* this Honorable Court clearly stated the standards to be followed regarding redaction. Your standard set forth in *Gray* deserves the highest respect. Instead, the prosecutor[3] herein made a mockery of it, to the extreme prejudice of Your petitioner. He asks Your Honorable Court for relief. Because of the lower court's failure to grant severance pretrial, or later a mistrial, this conviction must be reversed.

It cannot be said that the bad faith of the prosecutor and her detectives, as detailed *supra,* was not prejudicial to Petitioner. In light of the weakness of the case against him, as seen in the "Statement of The Case" *supra,* these were not harmless errors. One witness who implicated Petitioner was a codefendant, a corrupt source, hoping for a lighter sentence, who admitted he lied to the police in his original statement (N.T. 2/10/99

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[3] Assistant District Attorney Judith Rubino, a seasoned career prosecutor.

189-190). The other witness was a victim inside the house, who claims she saw Petitioner outside from her third floor window (N.T. 2/9/99 12) and also on the stairway (*id.* at 15-16), but she neither identified him at the preliminary hearing (N.T. 2/9/99 134-135) nor told the detectives about him in her original statement. *Id.* at 117-125.

There was not such overwhelming evidence of Petitioner's guilt that the prosecutor can show that the errors herein were harmless beyond a reasonable doubt. They were not *de minimus.*[4] The evidence in the instant case was certainly not overwhelming in contrast to *United States v. Simon*, 995 F.2d 1236 (3d Cir. 1993), in which four eyewitnesses consistently identified Mr. Simon as the shooter, and the alibi defense was weak and riddled with inconsistencies. The error here may have contributed to the verdict and, therefore, it cannot stand. *Commonwealth v. Bond*, 539 Pa. 299, 652 A.2d 308 (Pa. 1995). The prosecutor talking about "a redacted copy of the statement," the detective shortly thereafter asking about "the redacted version," were not cumulative of other untainted evidence. *Id.*, 539 Pa. at 313, 652 A.2d at 314. This prosecutorial misconduct evidences bad faith, without which there is a substantial likelihood that Your petitioner would have been acquitted.

Your petitioner selected his jury and was entitled to have that jury fairly try him without prosecutorial misconduct, which so inflamed his jury against him, as to make it impossible for that jury to be impartial. He placed himself in jeopardy once, asked to be tried by God and country, and was denied a fair trial by a cavalier and misguided prosecutor. Petitioner's right not to be again placed in jeopardy is enshrined in the Fifth Amendment of the United States Constitution as made applicable to and binding upon Pennsylvania in the Due Process Clause of the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 23 L.Ed 2d 707, 89 S. Ct. 2056 (1969). Also, *see* Article I, Section 10, of the Pennsylvania Constitution. The prosecutorial misconduct herein forecloses retrial because due process of the law has been denied petitioner.

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[4] This is especially true in light of more reliable evidence against Your petitioner, the traffic ticket, being negated by police testimony at post sentence hearings, see section 2 *infra*.

In *Commonwealth v. Anderson*, 439 A.2d 720 (Pa. Super. 1981), the Pennsylvania Superior Court held that the prosecutor's misconduct barred a retrial. The Court recited the applicable law as follows, *id.* at 722:

> In *Commonwealth v. Starks*, 490 Pa. 336, 416 A.2d 498 (1980), the Court defined two types of prosecutorial overreaching, both of which create exceptions to the general rule that the Double Jeopardy Clause does not bar retrial of a defendant whose motion for a mistrial has been granted. *Lee v. United States*, 432 U.S. 23, 30, 97 S. Ct. 2141, 2145, 53 L.Ed 2d 80 (1977): *United States v. Dinitz,* 424 U.S. 600, 607, 96 S. Ct. 1075, 1079, 47 L.Ed 2d 267 (1976). The first type of prosecutorial misconduct is designed to provoke a mistrial. *United States v. Dinitz*, 424 U.S. at 611, 96 S. Ct. at 1081. The second type is undertaken

> in bad faith to prejudice or harass the defendant. *Lee v. United States*, 432 U.S. at 33, 34, 97 S. Ct. at 2147, 2148; *Commonwealth v. Starks*, 490 Pa. at 341, 416, A.2d at 500. *See also, Commonwealth v. Hoskins*, 494 Pa. 600, 432 A.2d 149 (1981).

The Pennsylvania Supreme Court continues to uphold these principles. In *Commonwealth v. Jay Smith*, 615 A.2d 321 (Pa. 1992) and its progeny, the Pennsylvania Supreme Court held a retrial was barred in a homicide case (where a death sentence had been imposed) by the application of double jeopardy principles occasioned by prosecutorial misconduct.

It has been traditional to trust that the Commonwealth fully complies with the mandates of the State and Federal Constitutions. Countless jurists deposit such trust in the Commonwealth's representative on an every day basis and, indeed, the Court system could not function if the trial assistant was so distrusted by the Court to call for scrutiny of his or her every assertion. However, the Court herein was hoodwinked. For whatever reason, be it malice or mischief, the prosecutor did not carry out the Court's Order of redaction without any indication of redaction and, instead, flagrantly violated it. See N.T. 2/17/99 p.88. To permit the prosecutor to disclaim her responsibility for this would be to blind oneself to the realities of trial. A contrary result would offer the prosecutor the opportunity of gaining an unfair advantage in the first trial, while retaining the option of a second trial should her initial tactics prove unsuccessful.

Your Honorable Court cannot ignore the obvious and inevitable consequences of such misconduct; it cannot adopt the position that a prosecutor will not be held responsible for her intentional misconduct. For a court to fail to extend the protection of double jeopardy to Petitioner under such circumstances would, in essence, offer the prosecution license to act with impunity, and total disregard for the standards of conduct imposed upon it.

In *Commonwealth v. Martorano and Daidone*, 741 A.2d 1221 (Pa. 1999), first-degree murder convictions were reversed and the defendants were discharged. The Court held that since prosecutorial misconduct deprived them of a fair trial, the Double Jeopardy Clauses of the Pennsylvania and United States Constitutions barred a retrial. That Court explained as follows, *id.* at 1223:

> The prosecutorial misconduct in the case at bar clearly meets the *Smith* standard. Here, the prosecutor acted in bad faith throughout the trial, consistently making reference to evidence that the trial court had ruled inadmissible, continually defying the trial court's rulings on objections, and, in a tactic that can only be described as Machiavellian, repeatedly insisting that there was fingerprint evidence linking Appellees to the crime when the prosecutor knew for a fact that no such evidence existed. *See Commonwealth v. Martorano and Daidone*, 453 Pa. Super. 550, 555-59, 684 A.2d 179, 182-84 (1996) (describing numerous instances of prosecutor's misconduct). While such

> misconduct does not involve concealment of evidence as in *Smith*, it nonetheless evinces the prosecutor's intent to deprive Appellees of a fair trial; to ignore the bounds of legitimate advocacy; in short, to win a conviction by any means necessary. This is precisely the kind of prosecutorial overreaching to which double jeopardy protection applies.
>
> We agree with the Superior Court that, "'a fair trial is not simply a lofty goal, it is a constitutional mandate,' . . . [and] [w]here that constitutional mandate is ignored and subverted by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity." *Commonwealth v. Martorano and Daidone*, 453 Pa. Super. 550, 559-60, 684 A.2d 179, 184 (1996) (citation omitted). Accordingly, we affirm the Order of the Superior Court and discharge Appellees on double jeopardy grounds.

Your petitioner herein also continues to relies on the Double Jeopardy Clauses of the Pennsylvania and United States Constitutions. *See* U.S. Const., Amdt. 5; Pa. Const. Art. 1 § 10. Only his discharge will satisfy justice.

2. **Petitioner, Phu Duc Nguyen, was deprived of his right to effective assistance of counsel guaranteed by the Sixth Amendment where trial counsel stipulate that Petitioner had received a traffic citation in a certain car, when he denied this, without even checking that car's registration, which at post-sentence hearings clearly showed that Petitioner was not its owner.**

   This question was *denied* by the Third Circuit's Order granting appealability as to the issues argued relating to *Gray* and *Bruton*, dated April 25, 2007, based on "Petitioner's arrest in the car with a participant in the crime, . . .". It was never claimed by the Government that Petitioner was arrested, only that a traffic citation was issued. During Post-sentence hearings evidence was adduced from both Commonwealth and defense witnesses that it was not Petitioner who had received the ticket, but an unrelated person.[5] The issuing Officer could not identify Petitioner as the person he issued the citation to. Petitioner respectfully asks this Court to reconsider the denial of appealability of this issue.

The Third Circuit Court of Appeals erroneously refused to grant a certificate of appealability on the ineffective assistance of counsel issue in the instant case, and thus never reached the substantive issue which petitioner raises before this Court. However, had the Third Circuit accepted this case for review, it would have been compelled to grant relief, because the Your petitioner was effectively denied his right assistance of counsel, resulting in his conviction. Petitioner has argued this issue at every level beginning at the trial level, post sentence. This error is only compounded by the prosecutions conduct discussed in the redaction argument *supra*. Each issue viewed alone requires relief, and that much more so when both issues are viewed in tandem.

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[5] See, Appendix E, pp. 70a-73a, copy of ticket and other defense exhibits from the post-sentence hearings.

The Court of Appeals erred in refusing to issue a certificate of appealability on petitioner's vital assistance of counsel issue. This Court has just reaffirmed that the standard for issuance of a certificate of appealability is met when a petitioner demonstrates that jurists of reason could disagree with the district court's resolution of his case, or that the issues presented are adequate to justify further proceedings *Miller-el v. Cockrell*, 123 S. Ct. 1029, 154 L. Ed. 2d 931, 537 U.S. 322 (2003). Petitioner was denied due process under the Fifth and Fourteenth Amendments, and effective assistance of counsel guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. For that reason, this court should grant the petition for certiorari, or in the alternative, reverse the Third Circuit's denial of the certificate of appealability and order that court to review this issue on the merits.

As explained *supra* and in the trial court's Opinion, Appendix D, pp. 50a-51a, 55a, codefendant Minh Nguyen testified for the Commonwealth (in return for reduced charges and a lighter sentence) that Petitioner drove some of the group in a white, Acura Legend car with North Carolina plates, that he owned. *Id.* 54a, 57a-58a.

While this **contradicted Minh's original 1995 statement** that a blue Chevy Van had been used, *id.* at 58a, the Commonwealth sought to corroborate Minh about the white, Acura Legend car.

After Your petitioner's foster-mother, Sami Buisson-Daniel, testified that petitioner did not have or drive a white car (*id.* at 16), on rebuttal the Commonwealth sought to prove that he did (*id.* at 17). Trial counsel accommodated this by stipulating that (*ibid.*) petitioner had received a traffic violation ticket on November 25, 1995, in Philadelphia, while driving a white, Acura Legend with a 1995 North Carolina license plate, HYY1063 (N.T. 2/22/99 111-112). **It was never claimed that petitioner had been arrested in relation to this matter.**

At a post-sentence hearing, Petitioner's foster-mother testified that during the trial she was sequestered outside the courtroom (N.T. 9/27/99 44). At one point, trial counsel came into the hallway and showed her a copy of a traffic ticket that the prosecutor claimed had been issued to Petitioner in the said car (*ibid.*). Counsel saw Petitioner in a small interview room off that hallway, while his foster-mother stood by the door (N.T. 9/27/99 45). She testified that the following transpired (*ibid.*):

> And, with that, Anthony went into the little room and Phu was in there. I later saw him in there and I heard them yelling. I actually heard screaming.

> And I was on my way over to the door anyway because every time that he went to that room, I stood outside that door because I didn't trust Anthony Jackson. I didn't trust our lawyer.
>
> Q. What, if anything, did you hear between Mr. Jackson and Phu?
>
> A. I heard Phu yell, This is not my ticket. Don't stipulate. And Anthony was yelling, It is your ticket. I'm going to stipulate.
>
> Phu was saying something about, That's not my signature. Check it out. And at one point Anthony opened the door, and I almost fell in the door, in fact. And he and Phu was still arguing about it and I chimed in and I said, My son said, Don't stipulate to that ticket, so don't you do it. And he said he had to save face.

The said ticket was marked PSD-1 Appendix E, p. 70a (N.T. 9/27/99 46) and admitted into evidence (*id.* at 112).

A witness named Nancy Adler corroborated the testimony of Petitioner's foster-mother (*id.* at 63-66), as did his foster-sister, Aletha Todd-Daniel (*id.* at 72-73). Petitioner testified that he told his counsel that he never had received this citation, not to stipulate to it, and that he never had or drove a white, Acura Legend (*id.* at 78, 89).

Petitioner's driver's license was marked PSD-6, Appendix E, p. 71a, and admitted into evidence (*id.* at 112). It clearly showed his "8/16/95" issued North Carolina driver's license had his address of 1095 Sunset Drive, Cherryville, North Carolina (*id.* at 89-91). The North Carolina Registration Card for the white, Acura Legend car with the license plate of HYY1063 was marked PSD-2, Appendix E, p. 73a, and admitted into evidence (*id.* at 112). The prosecutor stipulated that she did not have this card at the time of trial and that defense counsel never showed it to Petitioner (*id.* at 92).

The traffic citation, PSD-1, Appendix E, p. 70a, reports HYY1063 as the license plate for the car ticketed. Appendix E, p. 70a. The registration card, PSD-2, Appendix E, p. 73a, shows that the car was registered to Khang Phuc Nguyen, not Petitioner, with a given address of 150 East Allens Mobile Home Park, Cherryville, North Carolina, not Petitioner's address. (N.T. 9/27/99 93-95) Petitioner testified that he never owned, registered, or drove such a car, nor saw this registration card, nor lived at the address on it. He did not receive this traffic citation, and was not in Pennsylvania on November 25, 1995, when the traffic ticket was issued. (*Id.* at 95-96.)

The officer who issued the ticket testified at this hearing, he could not identify Your Petitioner as the driver he cited. (N.T. 9/27/99 135.) He was available during the trial, but no one talked to him about it, and he did not come (*id.* at 134). Trial counsel did not interview this officer before stipulating that Petitioner had received the citation in question.

In his testimony at the post-sentence hearing, trial counsel admitted that Petitioner had (N.T. 9/28/99 6) "*insisted that he did not get the ticket. I told him, irregardless of whether you got it or not, it's your ticket.*" This took place (*id.* at 8) "in the consultation room adjacent to this courtroom." Counsel also admitted that his own (*ibid.*) "demeanor was probably a little bit more aggressive. I did say to him, because he said it wasn't his ticket, I said to him, you have to stipulate. You must stipulate to this."

Just how overbearing counsel was to Petitioner came out in the following testimony, including the trial judge's inquiry of counsel's behavior (N.T. 9/28/99 9):

> Q. Did you yell at him?
>
> A. I may have.
>
> THE COURT: Why? If he's not yelling at you, why are you yelling at him?
>
> THE WITNESS: Because he was saying to me he never got the ticket, and I was explaining to him he was walking himself into a life sentence by saying that he wouldn't stipulate.
>
> I said to him, You have to stipulate. I didn't yell at him in the sense of insulting him or berating

> him or calling him names, but I just had to make the point that he had to stipulate.

Counsel claimed that ultimately Petitioner *acquiesced* (*id.* at 13).

Counsel admitted on cross-examination that he never had seen the (*id.* at 18) "original ticket" he stipulated to nor "any microfilm," but relied on the prosecutor's "Faxed copy of the ticket on a sheet of paper". He also never had investigated the registration card, PSD-2, nor seen it (A70; *id.* at 23). He admitted that the plate number HYY 1063, which appears on the traffic ticket, PSD-1, is the same number on the registration card, PSD-2, which shows that the car was registered to a Khang Phuc Nguyen, which is not Petitioner's name (*id.* at 23-24) at an address which was never Petitioner's. In the year-and-a-half between arrest and trial, nor during the trial, did counsel investigate any of this, though Petitioner insisted that he never had a white, Acura Legend car and did not receive the ticket in question (*id.* at 24-26). That this was an important issue which defense counsel knew he would have to meet can be seen from his opening speech, when he told the jury that Petitioner's foster-mother would testify that he never owned a white, Acura Legend, nor had she seen him in one (N.T. 2/19/99 16).

Counsel's position at the hearing was that though Petitioner always denied he had received this ticket, even after counsel yelled at him to stipulate to it, Petitioner finally agreed because counsel told him that it was a better alternative than having the prosecutor produce the officers. (*Id.* at 31.) Counsel told Petitioner that he (*id.* at 39) "had to stipulate." Of course, had counsel investigated the car registration card, or merely taken the time to obtain and look at it, Petitioner's denial that it was his car would have been credible. It cannot be said that counsel's conduct of the defense was in Petitioner's interest under these circumstances and, therefore, he did not receive effective assistance of counsel. Petitioner's Sixth Amendment Right to counsel was denied him.[6]

This assignment of error goes to a betrayal of trust by trial counsel. He dared not stipulate to such an important part of the prosecution's case, this traffic ticket, when Petitioner repeatedly denied having received it. The Sixth Amendment of the United States Constitution and Article One, Section Nine of the Pennsylvania Constitution guarantee Petitioner the right to assistance of counsel for his defense. If such assistance was unreasonable and counsel's performance prejudiced Petitioner, as herein, he was denied his Constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Fundamental fairness cannot allow counsel's conduct herein. Whether he stipulated to the ticket against Petitioner's will or just overrode it, due process and equal protection of the law do not countenance this. Counsel's conduct and negligent assistance were so ineffective on Petitioner's behalf that it was derelict.

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[6] Counsel also claimed that he had a file in the case (*id.* at 15), which included what appellant had told him (*id.* at 45-46). This information was in a (*id.* at 46) "big, red book that I have, which I still have. . . . I still have that now with client interviews, handwritten client interviews that I had conducted of Phu. . . ." Counsel insisted (*id.* at 49) "I have the file. I have the binder." When asked by the trial court to check his file, counsel agreed (*id.* at 52) "If I have something, Mr. Moldovsky, I'll give it to you." Counsel agreed to bring his file or papers to the courtroom (*id.* at 68-69). The trial judge also told counsel that if he could not find it, to call your brief writer (*id.* at 70) " by the end of the business day today. . . ." The next day counsel called the court crier, Mr. Brooks, and reported that (N.T. 9/29/99 2) "he couldn't find any further part of the file or anything. . . ." So much for crediting what trial counsel had to say!

Petitioner could not have been convicted without Minh Nguyen's testimony. As a codefendant, he was a tainted, corrupt, and polluted source. The jury was so charged, as the trial court noted in its Opinion (Appendix D, p. 61a). His testimony and statements to the police also were contradictory. The stipulation herein corroborated Minh about Petitioner and his alleged white, Acura Legend car. Therefore, this was actual prejudice to Petitioner.

There was no reasonable basis for defense counsel to violate his client's instruction not to stipulate to a matter the prosecution must prove, or to so browbeat and harass his client that his acquiescence is coerced. But for this ineffective assistance of counsel, the outcome likely would have been different, without the stipulation's corroboration of Minh's contradictory statements and testimony. Petitioner was prejudiced by counsel's ineffectiveness. Even trial counsel's post sentencing hearing testimony that he felt he was better off stipulating than bringing in an officer for live testimony, and the lower courts reliance on same, is belittled by the Officer's testimony and documentation.

If trial counsel had done a proper, effective, investigation of the matter he would never reasonably come to the conclusion stipulation would be best. At worst, the officer's testimony and documentation would have raised reasonable doubt as to weather Your petitioner was the person ticketed. Even without a prior investigation, trial counsel could have forced the Commonwealth to produce the Office and at least interview him before deciding. Especially based on petitioner's strong and enduring protests.

This case merits relief under the three-prong test to determine ineffective assistance of counsel has been met. See *Commonwealth v. Rainey,* 656 A. 2d 1326, 1330 (Pa. 1995), citing and following *Commonwealth v. Douglas,* 537 Pa. 588, 645 A. 2d 226 (Pa. 1994).. Given the actual prejudice to Petitioner, it cannot be said that counsel's ineffectiveness was harmless error because it could not have contributed to the verdict. *See Commonwealth v. Robinson,* 554 Pa. 293, 721, A.2d 344, 350 (Pa. 1999); *see also U.S. v. Miller*, 248 Fed.Appx. 426 (3rd Cir. 2007) Petitioner respectfully requests that this Honorable Court grant his petition for certiorari, or in the alternative reverse the Third Circuit's denial of the certificate of appealability on this issue and Order that court to review, on the merits, this ineffectiveness claim.

CONCLUSION

Based on the foregoing, Your petitioner Phu Duc Nguyen respectfully requests that this Honorable Court grant his petition for certiorari and reverse the judgment of conviction and order him discharged or, in the alternative, grant him a new trial. Otherwise, petitioner respectfully requests the reversal of the Third Circuit's denial of the certificate of appealability on the ineffectiveness issue and Order that court to review, on the merits, the ineffectiveness claim.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 21, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-5285

PHU DUC NGUYEN,

Appellant

v.

WILLIAM LOVE, SUPERINTENDENT; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 04-cv-01665)
District Judge: The Honorable Petrese B. Tucker

Submitted Under Third Circuit LAR 34.1(a)
May 8, 2008

Before BARRY, STAPLETON, *Circuit Judges*,
and RESTANI,[*] *Judge*.

(Opinion Filed May 21, 2008)

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[*] Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

OPINION

BARRY, *Circuit Judge.*

A Pennsylvania jury convicted Phu Duc Nguyen ("Nguyen") of second-degree murder, robbery, and criminal conspiracy for his role in the 1995 murder of Todd Manga. The trial judge sentenced him to life imprisonment, his post-sentence motions were denied, the Pennsylvania Superior Court affirmed the judgment of sentence, and the Pennsylvania Supreme Court denied allowance of appeal. Thereafter, Nguyen filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting two multi-pronged grounds for relief. The District Court referred the matter to a magistrate judge for a report and recommendation ("R & R"), and the magistrate judge recommended denying the petition in its entirety. The District Court rejected Nguyen's objections to the R & R, approved and adopted the R & R, and declined to issue a certificate of appealability ("COA") as to any issue. Nguyen filed a timely notice of appeal, which we construed to be a request for a COA as to all issues decided by the District Court, and we granted a COA on two related issues:

> (1) whether the defendant's right to confront witnesses was violated when the prosecutor and/or the detective referred to a co-defendant's statement being "redacted," *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140

> L.Ed.2d 294 (1998); [and] (2) whether the prosecutor committed prosecutorial misconduct when referring to a co-defendant's statement as being "redacted."

For the reasons that follow, we will affirm the District Court's denial of the petition.

I.

The District Court had jurisdiction under 28 U.S.C. § 2254. We exercise appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

As Nguyen filed his habeas petition in 2004, federal court review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which requires that significant deference be accorded state court decisions. Our review, as was the District Court's review, is limited to considering "whether the state court reached a decision that was 'contrary to' or involved an 'unreasonable application' of clearly established Supreme Court law, or if [the] decision was based on an 'unreasonable determination' of the facts in light of the evidence presented." *Fahy v. Horn*, 516 F.3d 169, 189 n. 20 (3d Cir.2008) (quoting 28 U.S.C. § 2254(d)). A state court's application of Supreme Court precedent is only considered unreasonable if: (1) it "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case;" or (2) it "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "We review *de novo* whether the District Court appropriately applied AEDPA's standards of review." *Taylor v. Horn*, 504 F.3d 416, 428 (3d Cir.2007).

II.

A. Issue 1-Whether the prosecutor's reference to a co-defendant's statement as "redacted" violated *Bruton* and *Gray*.

In *Bruton*, the Supreme Court held that a defendant's Sixth Amendment right to confront adverse witnesses is violated by the admission of a nontestifying co-defendant's confession which implicates both defendants, even if the jury is instructed that it may only consider the confession against the defendant who confessed. 391 U.S. at 135-36. Thus, in order to avoid a *Bruton* violation, prosecutors trying multi-defendant cases must, at the very least, redact the incriminating statements of non-testifying defendants to delete references to his or her co-defendants. *See Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) (declaring that "the Confrontation Clause is not violated by the admission of a nontestifying co-defendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence"). However, not all redactions do the trick. In

Gray, the Court held that a confession that is altered in such a way that it obviously implicates a co-defendant (e.g., it contains a blank space, the word "redacted", or a symbol in place of the co-defendant's name) falls within the class of statements prohibited by *Bruton*. 523 U.S. at 196-97.

Nguyen argues that the prosecutor's reference to his co-defendant's confession as "redacted" violated *Bruton* and *Gray* because the jury could have inferred from the comment that the confession was redacted to delete any reference to him. In considering this issue on direct appeal, the Pennsylvania Superior Court criticized the prosecutor's conduct, but concluded that the trial court did not err by declining to declare a mistrial following the comment because it "could not be construed as inevitably referring to this defendant." (App. at 59.) Moreover, the court found that even if a *Bruton* violation had occurred, any error in this respect would have been harmless because "the Commonwealth's evidence against [Nguyen] regarding his participation, which included both the testimony of the co-conspirator Minh and eyewitness testimony of one of the victims, was overwhelming." (*Id.*)

The Supreme Court has never held that the mere reference to a co-defendant's incriminating statement as "redacted" violates a defendant's Sixth Amendment right to confront adverse witnesses, so we must decide whether the Superior Court's conclusion was reasonable in light of the Supreme Court's pertinent precedent. We find that it was. As the Superior Court noted, the relevant inquiry under *Gray* is whether the prosecutor's comment *directly* inculpated Nguyen. *See Priester v. Vaughn*, 382 F.3d 394, 401 (3d Cir.2004) (holding that *Bruton* was not violated because "there were at least fifteen perpetrators involved in the shooting, and the phrases 'the other guy' or 'another guy' are bereft of any innuendo that ties them *unavoidably* to [the petitioner]") (emphasis added). The prosecutor's use of the word "redacted" neither revealed the nature of the edits made to the confession nor suggested in any manner that the confession incriminated Nguyen. Accordingly, Nguyen was not entitled to habeas relief on this ground.

B. Issue 2-Whether the prosecutor's reference to a co-defendant's statement as "redacted" constituted prosecutorial misconduct.

Nguyen asserts that the prosecutor's reference to his co-defendant's statement as "redacted" also constituted prosecutorial misconduct. This argument is similarly unavailing.

In evaluating claims of prosecutorial misconduct, "we consider whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Fahy*, 516 F.3d at 198 (quotations and citation omitted). The Supreme Court has instructed that in order to rise to the level of a denial of due process, "the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial."

Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (quotations and citation omitted).

The Superior Court concluded that the effect of the prosecutor's comment on the jury, if any, was harmless. This conclusion was surely not unreasonable. As we have already explained, the comment did not unavoidably suggest to the jury that Nguyen's codefendant implicated him. Given the extremely limited effect that this comment could have had on the jury and the substantial amount of evidence linking Nguyen to the robbery and murder, we cannot conclude that the comment resulted in a denial of due process. As such, Nguyen was not entitled to habeas relief on this ground.

C. Miscellaneous Issues Not Included Within the COA

Nguyen's brief raises several issues in addition to the two issues as to which a COA was granted, including: (1) whether the statements of his nontestifying codefendants were sufficiently redacted to avoid a violation of his Sixth Amendment right to confrontation; (2) whether the trial court abused its discretion by denying his motion for severance; and (3) whether his attorney's decision to stipulate that Nguyen had received a traffic citation in a particular car constituted ineffective assistance of counsel. Nguyen has not "made a substantial showing of the denial of a constitutional right" as to these grounds, 28 U.S.C. § 2253(c)(2), and we thus decline his invitation to expand the scope of the COA beyond that granted by the motions panel.

III.

For the foregoing reasons, we will affirm the District Court's order denying the petition for a writ of habeas corpus.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED OCTOBER 28, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 04-1665

PHU DUC NGUYEN,

Petitioner,

v.

WILLIAM LOVE, ET AL.,

Respondents,

ORDER

AND NOW, on this ___ day of October, 2005, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation (the "R&R") of United States Magistrate Judge Carol Sandra Moore Wells (Doc. 11), Petitioner's Objections (Doc. 12), and Respondent's Response to Petitioner's Objections (Doc. 13), **IT IS HEREBY ORDERED AND DECREED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED;**

Magistrate Well's Report and Recommendation fully addresses the Petitioner's claims as presented in the Petitioner's habeas petition. In his petition, Petitioner seeks habeas corpus relief based upon claims of ineffective assistance of counsel[1] and prosecutorial misconduct.[2]

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[1] The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington,* 466 U.S. 668, 686 (1984). The two-pronged *Strickland* test requires the defendant to show not only that counsel's performance was deficient, but also that "such deficient performance prejudiced the defense." *Id.* at 687. In order to prove deficiency of counsel, defendant must show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.* Furthermore, defendant must prove that counsel's performance prejudiced the defense by illustrating that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In addition, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If petitioner does not satisfy either prong of the test, his claim for ineffective assistance of counsel fails, making a determination on the remaining prong unnecessary. *Id.* at 697.

[2] The U.S. Supreme Court held, in *Bruton v. U.S.*, that "the Government's introduction of a co-defendant confession (Cont'd)

Petitioner alleges that his trial counsel coerced him into stipulating that Petitioner had "received a traffic violation ticket in a certain car, when he denied this, without even checking that car's registration, which at post-sentence hearings clearly showed that Petitioner was not its owner." (Objections to Report and Recommendations at 3). Petitioner asserts that in stipulating to the ticket under the circumstances so described, trial counsel's actions constituted ineffective assistance of counsel, thus meriting habeas relief. Petitioner's counsel had a reasonable basis for entering the stipulation after discussion with his client and trial counsel's conduct, by no analysis, fell below professional

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(Cont'd)

implicating Bruton without the co-defendant taking the witness stand violated the accused's right to confront the witness under the Confrontation Clause of the Sixth Amendment. *U.S. v. Smith,* 2004 U.S. Dist. LEXIS 23358, *5 (E.D. Pa. November 15, 2004) *(citing Bruton v. U.S.*, 391 U.S. 123 (1968)). The U.S. Supreme Court later decided in *Gray v. Maryland,* that any indications of redaction in statements admitted into evidence of nontestifying co-defendants violates the defendant's Sixth Amendment right to confront witnesses. *See Gray v. Maryland,* 523 U.S. 185 (1998). However, the U.S. Supreme Court has held that "where ascertaining the identity of a co-defendant in a redacted statement requires an inference drawn from linking other evidence to the statement, the risk that the jury cannot follow limiting instructions is not sufficiently substantial to violate the Sixth Amendment." *Priester v. Vaughn,* 382 F.3d 394 (3d Circ. 2004) *(citing Richardson v. Marsh,* 481 U.S. 200, 208 (1987)). In the present case, Mr. Nguyen's statements did not specifically allude to or reference Petitioner and they were read only after cautionary instructions to the jury.

expectations. Thus, Petitioner's claim of ineffective assistance of counsel is meritless.

Petitioner further asserts prosecutorial misconduct and double jeopardy claims.[3] Petitioner alleges that his constitutional rights were violated when the trial court allowed into evidence a redacted statement by co-defendant, Mr. Nguyen, with the term "other guys" in place of Petitioner's name. Petitioner alleges that the redaction was essentially undone at trial, as the prosecutor intentionally and intelligently gestured at the defense table when mentioning the term "other guys" in the violation of Petitioner's Fifth, Sixth and Fourteenth Amendment rights.

Petitioner further alleges that Detective Baker's reference to the "organized crime" unit as the source of Petitioner's photo identification was prejudicial and warrants a mistrial. The record reflects that upon sustaining an objection by Petitioner's counsel as to the use of the term "organized crime unit," Judge Fitzgerald cured any potential error caused by this reference in providing a limiting instruction to the jury. N. Tr. 136, Feb. 16, 1999; N. Tr. 162, Feb. 24, 1999. Furthermore, Judge Fitzgerald provided a curative instruction with respect to the detective's reference to organized crime. N. Tr. 86, Feb. 22, 1999. A jury is presumed to follow a trial court's instructions to disregard comments. *Greer v. Miller*, 483 U.S. 756 (1987). Thus, Petitioner's claim of prosecutorial misconduct is without merit.

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[3] Magistrate Well's Report and Recommendation fully addresses the Petitioner's double jeopardy claims.

Upon reviewing the issues raised by the Petitioner, both the Trial Court and the Pennsylvania Superior Court concluded that neither the prosecutor nor the witness acted in bad faith, and that the prosecutor did not intentionally make the reference to "organized crime." N. Tr. 78.2/22/99. However, Petitioner alleges that the prosecutorial misconduct caused him to be convicted despite the "weakness of the case against him." (Pet. Br. 28). The case presented against Petitioner, however, was established by the evidence presented by the Commonwealth and eyewitness testimony.

2. Petitioner's Objections to the Magistrate Judge's Report and Recommendation are **OVERRULED**;
3. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is **DENIED** and **DISMISSED**;
4. A certificate of appealability is **NOT GRANTED**.
5. The Clerk of the Court shall mark this case as **CLOSED**.

BY THE COURT:

Hon. Petrese B. Tucker, U.S.D.J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED JUNE 29, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 04-1665

PHU DUC NGUYEN,

Petitioner

v.

WILLIAM LOVE, ET AL,

Respondents

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS June 29, 2005
UNITED STATES MAGISTRATE JUDGE

Presently before this court is a Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Phu Duc Nguyen ("Petitioner") currently is incarcerated at the State Regional Correctional Facility at Houtzdale, Pennsylvania. Petitioner seeks habeas corpus relief based upon claims of ineffective assistance of counsel and prosecutorial misconduct. The Honorable Petrese B. Tucker referred this matter to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1). For reasons that follow, Petitioner's habeas petition should be dismissed, without an evidentiary hearing.

I. BACKGROUND AND PROCEDURAL HISTORY[1]

The facts leading to Petitioner's arrest and conviction, as summarized by Judge James J. Fitzgerald, II, of the Philadelphia Court of Common Pleas, are as follows:

> [Petitioner] was arrested and charged with the offense of Murder (for the killing of Mr. Todd Manga) ("Manga") and several counts of Robbery, for the armed Robberies of Ms. Jackie Kim ("Kim"), the manager of a "massage parlor" at 908 Arch Street, Philadelphia, Pa., and several of Kim's female workers, and Conspiracy. The essence of the theory of the Commonwealth's case was that a group of nine individuals agreed to rob the massage parlor, and, possibly also agreed to shoot, or kill Manga, who worked as a security guard at the massage parlor.

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1. The facts contained in this section were gleaned from the Petition for Habeas Corpus, Memorandum in Support thereof, the Commonwealth's Answer, inclusive of all exhibits thereto, Petitioner's Reply to the Commonwealth's Answer, the Commonwealth's Response to Petitioner's Reply, and the state court record.

[Petitioner] and four co-defendants (Thanh Van Tran, aka, "Nghia," and, Loc Tran ("Tran"), and Hue Tran Phan, aka "Phan Hue", aka "Tony", and Quang Van Nguyen ("Quang") received a joint trial, which commenced on February 3, 1999, and concluded on March 1, 1999.

* * *

Manga was shot and killed when several of [Petitioner's] confederates, acting in concert, surrounded him, while he was shot by one or two of them. [Petitioner] was not alleged to have been an actual "shooter," and his role in the criminal enterprise was to act as a "look-out."

Mr. Minh Nguyen ("Minh"), a confederate of the defendants, entered into a guilty plea agreement with the Commonwealth on April 1, 1997, and subsequently entered guilty pleas to Murder of the Third Degree, Robber and Conspiracy, before this Court, on April 17, 1997.

* * *

Minh further testified that he was 21 years old in August, 1995, and had moved to Philadelphia from Maryland, and resided at 1956 Harold Street, after [Quang] had invited him to come to Philadelphia. The home at 1956 Harold Street was owned by codefendant Phan Hue, whom Minh referred to as "Tony". Minh did not pay codefendant Phan Hue rent. While in Philadelphia, Minh met all of the codefendants, and he identified them in court by referring to their photographs.

On a regular basis, Minh and all of the defendants, and unindicted confederates, would frequently visit a park in South Philadelphia, where they would socialize, drink beers and gamble.

On the afternoon of August 3, 1995, Minh went to the park with codefendants, Phan Hue and Quang. Quang drove them to the park in a Mazda. Once at the park, they joined [Petitioner] and codefendants Tran and Nghia. Also present with the group at that time, were then unidentified co-conspirators, named, "Hieu", "Chau" and, "Sang" (also known as Diah Sant).

While the group was together in the park, codefendant Phan Hue, whom Minh referred to as Tony, spoke to the group about a plan to go to the massage parlor and rob it.

Phan Hue discussed a plan to extort money from the owner, under the threat of messing the place up.

Phan Hue stated that he could not enter the massage parlor because the owner knew his face and would not let him in. He also told the group to demand $500.00 a week. The group was supposed to scare the owner by messing the place up.

Hieu one of the group who was not on trial, possessed a silver handgun, which Minh described as a .380 automatic. [Petitioner] told Hieu that he was supposed to "take care of the security guard."

***

Later in the evening, after the group had eaten dinner, and had visited a karaoke bar, Phan Hue personally drove Minh and Hieu and co-defendant Loc Tran to the massage parlor in his (Phan's) Toyota Van. When they arrived at the scene, Minh, Hieu, and Loc Tran went into the parlor on the building's second floor, after being "buzzed" through the door by someone inside. Three others from the group were already inside the parlor, being, codefendant Nghia, codefendant Quang, and Chau.

[Petitioner], Sang, and codefendant "Phan Hue" stayed outside. They were to act as "lookouts." Subsequently, [Petitioner] did enter the premises to warn the others that a "customer" was coming.

Once inside, the various members of the group sat about, and after several minutes, the manager, or owner, Ms. Jackie Kim told them that if they were not going to pick any girls they would have to leave. Everyone in the group stood up and walked towards the door where the security guard, Mr. Todd Manga was standing. At that time, a struggle ensued, and gunshots were fired. Minh thought that everyone was trying "to get the security guard or something". Hieu stood behind the guard and codefendant Nghia stood in front of the guard. Codefendants Tran and Hieu fired their respective weapons. The rest of the group sat down, and codefendant Tran ran down the steps and brought Jackie Kim, who had been trying to flee, back into the parlor.

Prior to the incident, codefendant Phan Hue had told the group that they were to do whatever Thanh said.

After Mr. Todd Manga was shot, the individual girls were taken to their respective rooms and robbed. Various members of the group performed different tasks. Codefendant, Nghia, took girls upstairs to their rooms. Codefendants Quang and Tran searched a room downstairs, and Quang returned to the parlor with a camera video-tape. Minh and Chau stayed in the parlor and watched the girls who had not yet been taken to their respective rooms, and Minh also went upstairs to search for any missing girls. Throughout the incident, codefendant Tran brandished his weapon and demanded money from various girls and a customer.

At one point, [Petitioner], who had been acting as a look-out, came into the stairway area and warned the group of an approaching customer. The customer was allowed in, and money and jewelry were taken from him. Money and jewelry were also taken from a customer who had been in the parlor when the group arrived. At one point, Chau had sex with one of the girls.

The entire criminal incident took about two hours. Before the group left, Minh handcuffed Jackie Kim inside a closet, with handcuffs taken from the body of Mr. Manga by Hieu, who also took Mr. Manga's gun; and young women were told to undress, and they were then tied up with telephone wire.

After the incident, Minh and the others, excepting "Phan Hue" returned to the house on Harold Street, owned by "Phan Hue." Minh testified that [. . . Petitioner] drove them there in a car, which Minh described as being a "white, Acura Legend."

> Codefendant Phan Hue was not outside when the group left the parlor, and he was not at the house on Harold Street when the group returned to the house.
>
> At the house on Harold Street, [Petitioner] and codefendant, Than Tran divided the proceeds from the robberies between the various members. Everyone then left the house except for Minh and [Petitioner].

See Commonwealth v. Nguyen, No. 0410, Mem. Op. at 1,3-7. (Phil. July 1997). On March 1, 1999, Petitioner was found guilty of Murder of the Second Degree, four counts of robbery, and Criminal Conspiracy. *Id.* at 2; *see also* Respondent's ("Resp't") Brief ("Br.") at 3. Petitioner was sentenced to Life Imprisonment for Murder of the Second Degree, and on April 19, 1999, the Court imposed concurrent sentences of not less than 10 years, nor more than 20 years on the Conspiracy bill, and concurrent sentences of not less than 5 years, nor more than 10 years on the robbery bills. *Id.* Petitioner filed post sentence and supplemental motions and, on September 27 and 28, 1999, an evidentiary hearing was conducted before Judge Fitzgerald. Resp't. Ex. A. On September 29, 1999, the Criminal Appeals Unit of the Philadelphia Court of Common Pleas denied Petitioner's post sentence motions. Resp't Ex. A. On September 5, 2002, the Pennsylvania Superior Court affirmed

Petitioner's judgment of sentence.[2] *Commonwealth v. Nguyen*, 813 A.2d 906 (Pa. Super. 2002); *see also* Resp't Ex. C. The Pennsylvania Supreme Court denied Allowance of Appeal, on April 22, 2003.[3] *See Commonwealth v. Nguyen*, 823 A.2d 144 (Pa. 2000).

The instant petition for writ of habeas corpus, filed on February 25, 2004, alleges:

> Ground One [1] -It was [in]effective assistance of counsel to stipulate that Petitioner had

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[2] On direct appeal, Petitioner presented two issues:

> Issue One: Whether the Commonwealth committed prejudicial error when the prosecutor referred to a "redacted copy of the statement" of one of the five codefendants, and a Commonwealth witness twice testified that [Petitioner's] photograph was provided by the "Organized Crime" unit, though there was no evidence that [Petitioner] was involved in organized crime?
>
> Issue Two: Whether trial counsel was ineffective in entering into a stipulation that [Petitioner] had received a traffic ticket in a certain car, when [Petitioner] denied that he had, and counsel had not independently verified the car's registration?

Commonwealth v. Nguyen, 813 A.2d 906 (Pa.Super. 2002); *see also* Resp't. Ex. C at 6-7.

[3] There is no indication that Petitioner filed either a petition for review before the U.S. Supreme Court or a petition under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.*

> received a traffic violation in a certain car, when [Petitioner] denied this, without even checking that the car's registration which at post-sentencing's hearings clearly showed that Petitioner was not its owner without this evidence Petitioner would not have been convicted;
>
> Ground Two [2] - During a trial of five (5) co-defendants where redactions of a statement was not possible and the Court failed to grant severance the prosecution i[m]permissibly refers to "a redacted copy of the statement" of one of them and the detective twice testified that Petitioner's photography was provided by [the] "organized crime" unit (despite being admonished not to by the Court), though there was no evidence that Petitioner was involved in organized crime and where the statement of a non-testifying co-defendant who was also Asian and had the same last name as Petitioner was admitted. This conviction should have been reversed and any further prosecution precluded because of bad faith triggering double jeopardy considerations. Petitioner asks this Court to order such relief.

Petition for Writ of Habeas Corpus ("Pet.") at 9-10.[4] The Commonwealth defends that Petitioner's habeas claims are all meritless and, therefore, should be denied and dismissed. This Court agrees.

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[4] This Court will discuss Petitioner's issues in the order presented in his counseled petition.

II. DISCUSSION

A. Merits - Grounds One and Two

1. Standard of Review

Petitioner has presented two timely, exhausted claims in this petition. Hence, both will be reviewed on their merits. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which "altered the standard of review that a federal habeas court must apply to a state prisoner's claim that was adjudicated on the merits in state court." *Stevens v. Delaware Corr. Ctr.*, 295 F.3d 361, 368 (3d Cir. 2002) (*citing Williams v. Taylor*, 529 U.S. 362 (2000) (*interpreting* 28 U.S.C. § 2254(d)(1)); *see also Dunn v. Colleran*, 247 F.3d 450, 456-57 (3d Cir.2001) (*explaining Williams*). More specifically, AEDPA "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Dunn*, 247 F.3d at 456-57 (*quoting Williams*, 529 U.S. at 399). Pursuant to AEDPA, a federal habeas court may overturn state court's resolution of the merits of a constitutional issue only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the United States Supreme Court on a set of materially indistinguishable facts. *Hackett v. Price*, 381 F.3d 281, 286 (3d Cir. 2004). Under the "unreasonable application" clause, a federal court may grant the writ if the state court identifies the correct governing legal principle from Supreme Court decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* (*quoting Williams*, 529 U.S. at 412-13). The appropriate inquiry under the "unreasonable application of" standard is "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* (*quoting* 529 U.S. at 409, 120 S.Ct. 1495). An unreasonable application of federal law involves more than merely an incorrect or erroneous application of federal law: "[A] federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Id.* (*citing Williams*, 529 U.S. at 411, 120 S.Ct. 1495).

The Supreme Court addressed AEDPA's factual review provisions in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L. Ed.2d 931 (2003). In *Miller*, the Supreme Court interpreted § 2254(d)(2) to mean that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* at 340. Yet, the habeas court can "disagree with a state court's credibility determination." *Id.*; *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d. Cir. 2004); *see also Wiggins v. Smith*, 539 U.S.

519 (2003) (rejecting state court's factual determination under § 2254(e)(1) and 2254(d)(2)). If the state court's decision based on a factual determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is warranted under 2254(d)(2). *Lambert v. Blackwell*, 387 F.3d 235.[5]

1. Ineffective Assistance of Counsel - Ground One

Petitioner asserts that trial counsel was ineffective for stipulating that Petitioner had received a traffic citation in a certain car although Petitioner insisted that he had never received this ticket.[6] Pet. Br. at 33-36.

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[5] Within this overarching standard, a petitioner may attack specific factual determinations made by the state court that are subsidiary to the ultimate decision. *Lambert v. Blackwell*, 387 F.3d 210, 235. Here, section 2254(e)(1) instructs that the state court's determination must be afforded a presumption of correctness that the petitioner can rebut only by clear and convincing evidence. *Id.* A petitioner may develop clear and convincing evidence by way of a hearing in federal court if she/he satisfies the prerequisites for that hearing found in 28 U.S.C. § 2254(e)(2). *Id.* In the final analysis, even if a state court's individual factual determinations are overturned, remaining findings must still be weighed under the overarching standard of section 2254(d)(2). *Lambert v. Blackwell*, 387 F.3d 210, 235-36.

[6] Upon denying Petitioner's Motion for Post Sentence Relief, Judge Fitzgerald's November 10, 2000 opinion stated:

> On rebuttal the Commonwealth sought to introduce evidence of the [Petitioner's] operation of a white

(Cont'd)

Petitioner alleges that his trial counsel coerced him into entering a stipulation regarding the traffic ticket and failed to investigate Petitioner's alleged North Carolina registration card, the traffic ticket, and the officer who issued the traffic ticket. *Id.* at 37. Petitioner specifically complains that the stipulation was prejudicial to his case:

> Codefendant Minh Nguyen testified for the Commonwealth (in return for reduced charges and a lighter sentence) that Petitioner drove some of the group in a white, Acura Legend car with North Carolina plates, that he owned. While this contradicted Minh's original 1995 statement that a blue Chevy Van had been used, the Commonwealth sought to corroborate Minh['s] [testimony] about the white Acura Legend car.

(Cont'd)

> Acura Legend on more than one occasion. On one occasion, the [Petitioner] was purportedly with codefendant Thanh Tran. After discussion with the Commonwealth and the [Petitioner], counsel for the [Petitioner] agreed to a stipulation. By stipulation, the Commonwealth introduced evidence in rebuttal, that the [Petitioner] received a traffic citation, (No. D0161238-0, Ex. C-68) issued on November 25, 1995, in Philadelphia, for driving through a "stop" sign, and was driving a "white Acura Legend" with a 1995, North Carolina license plate (HYY1063), and provided an address of 1095 Sunset Drive, Cherryville, North Carolina, 28021. (N.T. 2/22/99, p. 111-112).

Resp't Ex. B.

* * *

> Petitioner could not have been convicted without Minh Nguyen's testimony. Since he was a codefendant, he was a tainted, corrupt, and polluted source. The jury was so charged, as the trial court noted in its Opinion. His testimony and statements to the police also were contradictory. The stipulation herein corroborated Minh['s] testimony about Petitioner and his alleged white, Acura Legend car. Hence, this was actual prejudice to Petitioner.

Pet. Br. at 33, 38 (*internal citations omitted*).

The Commonwealth responded, based upon the factual findings of the trial court, that Petitioner agreed to the stipulation and that trial counsel had a "reasonable trial strategy basis" for agreeing to the stipulation. Resp. Br. at 13. This court is persuaded by the Commonwealth.

To demonstrate ineffective assistance of counsel, Petitioner must satisfy the two-pronged federal constitutional standard established in *Strickland v. Washington*, 466 U.S. 668, 688 (1984). *See also Hess v. Mazurkiewicz*, 135 F.3d 905 (3d Cir. 1998). First, Petitioner must demonstrate that counsel's performance was so deficient as to fall below an objective standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688.

After having adequately established that counsel's performance was constitutionally deficient, Petitioner must further show that the deficient representation prejudiced the defense. *Id.* If Petitioner fails to satisfy either prong of ***Strickland***, his claim necessarily fails, rendering inquiry into the remaining prong unnecessary. *See* ***Strickland***, 466 U.S. at 697.

The Pennsylvania Superior Court deemed Petitioner's ineffective assistance of counsel claim meritless based on the testimony of Anthony D. Jackson, Petitioner's trial counsel, at the post-trial hearing. *See Commonwealth v. Nguyen*, 813 A.2d 906 (Pa.Super. 2002); *see also* Resp. Ex. C at 20. The Superior Court noted that:

> Trial counsel, Anthony D. Jackson, testified at that post trial hearing that following the presentation of his case, in which he put [Petitioner's] "adoptive" mother on as a witness to testify that [Petitioner] did not own a white Acura Legend, the assistant district attorney approached him with a photocopy of a traffic ticket that she was going to introduce to establish that [Petitioner] received a traffic ticket in Philadelphia while driving a white Acura Legend. The assistant district attorney sought from [Petitioner's] counsel a stipulation as to accuracy. Otherwise, she would be required to bring in the Philadelphia police officer who issued the ticket to testify as to the circumstances of its issuance. Of more

concern to [Petitioner's] counsel, however, was the Commonwealth representation that she would produce testimony from police officers from a Philadelphia suburb (Collingdale, Delaware County) who would testify that they had arrested [Petitioner] while in the company of codefendant Tran and another man, and at the time of the arrest they were in possession of a white Acura Legend. This latter testimony was of particular concern to defense counsel because it put his client in the company of one of the codefendants who had already given an incriminating statement. Based on this concern, and based on his well-reasoned belief that the ticket was less damaging than the testimony of the Collingdale police officer, he advised [Petitioner] to agree to the stipulation. On this record, trial counsel clearly had a reasonable basis for the advice he gave to [Petitioner], and for ultimately entering into the stipulation.

It merits mention as well that the traffic ticket did contain information that supported the Commonwealth contention that [Petitioner] was the driver of the vehicle. Specifically, on the face of the ticket appeared [Petitioner's] social security number, which was information that did not appear on the face of [Petitioner's] driver's license. At the post-trial hearing, the assistant district attorney

> represented that she would have produced the Philadelphia Police Officer who wrote the ticket, and he would have testified that he verified the driver's face with his license, and also wrote down on the ticket the driver's social security number. Thus, there is every indication that the traffic ticket would have been admissible with or without [Petitioner's] counsel's stipulation, and by agreeing to the stipulation counsel kept from the jury the additional damaging information. On this record we find no basis to disagree with the trial court judge that trial counsel was not ineffective.

Id. at 20-21 (*internal citations omitted*). The state court, finding that Petitioner's counsel had a reasonable basis for entering the stipulation, after discussion with his client, denied Petitioner's argument and found the record belies his claim of ineffective assistance of counsel.

This court, upon review, agrees that trial counsel's agreement to enter a stipulation as to the traffic ticket, by no analysis, fell below professional expectations. Hence, the first prong of *Strickland* cannot be satisfied. As the state intermediate court specifically noted, the traffic ticket would have been properly introduced into evidence, without the stipulation. *Id.* at 21. Moreover, testimony from the Philadelphia Police Officer who issued the ticket to Petitioner, was potentially more prejudicial to the defense, because, it conclusively proved Petitioner's prior relationship with co-defendant Tran. Petitioner's trial counsel credibly testified that he agreed to the stipulation as trial strategy in an effort to keep this "additional damaging information" from the jury. *Id.* Therefore, the prejudice requirement of *Strickland* cannot be met either. Hence, I find that the state courts' determination, that counsel had not performed deficiently during trial by stipulating to the fact that Petitioner received a traffic ticket, while driving the white Acura was neither contrary to nor an unreasonable application of clearly established federal law. *See Bell v. Cone*, 535 U.S. 698; 28 U.S.C.A. § 2254(d).

Moreover, this court finds Petitioner's assertion that he was coerced into entering the stipulation unpersuasive.[7] Pet. Br. at 34-36. The trial court in its Findings of Fact and Conclusions of Law found that Petitioner, "after consultation with counsel, freely, voluntarily, and knowingly agreed to the stipulation." Resp't Ex. A at 1; *see also* Resp't Ex. B at 18 *(citing* Order Denying Post Sentence Motions entered 9/29/99). The record confirms that, although Petitioner "initially disagreed to the entry of the stipulation," after conferring with his attorney, he consented to the lesser of two evils. Resp. Ex. A at 1. The State courts' conclusion that trial counsel acted with his client's consent was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, hence ground one must be dismissed.

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[7] Petitioner asserts his trial counsel was "overbearing" and coerced him into entering the stipulation. Petitioner specifically argued:

> In his testimony at the post-sentence hearing, trial counsel admitted that Petitioner had "insisted that he did not get the ticket. I told him, irregardless of whether you got it or not, it's your ticket." This took place "in the consultation room adjacent to this courtroom. Counsel also admitted that his own "demeanor was probably a little bit more aggressive. I did say to him, because he said it wasn't his ticket, I said to him, you have to stipulate. You must stipulate to this."

Pet. Br. at 35.

2. Prosecutorial Misconduct - Ground 2

Next, Petitioner complains about the prosecutor's reference to a "redacted copy of the statement" of one of Petitioner's co-defendants as well as Detective Baker's testimony at trial that Petitioner's photograph was provided by the "organized crime" unit. He urges that this court reverse the conviction and preclude further prosecution, because of "bad faith triggering double jeopardy considerations." Pet. at 10. This court will discuss *ad seriatim* Petitioner's three claims.

a. Redaction Claims

Petitioner asserts that the prosecutor's reference to the "redacted statement" of one of Petitioner's codefendants violated *Gray v. Maryland*, 523 U.S. 185 (1998). Specifically, Petitioner alleges:

> A mistrial should have been granted when the prosecutor flagrantly violated *Gray v.*

> *Maryland. Gray* categorically prohibited "indications of redaction" in statements admitted into evidence of nontestifying codefendants as herein, where two such confessions were admitted at Petitioner's trial. The use of "other guys" and "my friends" violates *Gray*, as will be detailed *infra*. However, beyond all question, the prosecutor's brazen reference to "a redacted copy of the statement" in front of the jury unequivocally does.

Pet. Br. at 15 *(internal citations omitted).*

The state appellate courts reviewed and found this claim meritless. Judge Fitzgerald's November 10, 2000 ruling on Petitioner's post-sentence motions elucidated why the court denied Petitioner's request for a mistrial on this basis.[9]

> Finally, the Court did not err in denying a defense request for a mistrial after the Commonwealth referred to a "redacted" statement by the co-defendant, Quang Van Nguyen.
>
> Prior to trial, statements given to the police by any of the defendants were redacted so as [to] delete any reference to a codefendant. On direct examination of Detective Thomas Augustine, the prosecutor, prior to reading the statement, the prosecutor asked the detective if he had a copy of the redacted

> statement, and the witness answered yes. (N.T. 2/16/99, p. 130). Following immediate objections a side bar conference was conducted. The Court instructed all parties to not mention the specific word "redacted", and informed counsel that it would give the jury an immediate cautionary instruction, and denied motions for a mistrial. (N.T. 2/16/99), p. 131-133). Thereafter, the Court did instruct the jury that codefendant, Quang Van Nguyen's pre[-]trial statement was evidence only against him, and was not evidence against any other defendant, and could not be considered in any way, against any other defendant. (N.T. 2/16/99, p. 136).
>
> Further, the passing reference to a redacted statement was *de minimis*, and any error was cured by the Court's cautionary instruction to the jury after the statement was read to the jury (N.T. 2/16/99, p. 136). Additionally, the statement, as read to the jury, mentioned "other guys" as opposed to "X", "Y", or "Z" so as to minimize any contextual implication problems. In summary, the reference did not require the drastic remedy of a mistrial. (*See, Comm. v. Rainey*, Pa. 656 A.2d 1326, at 1331-1333, and fn. 5 at 1332, (1995).

Resp't Ex. B at 18-19. The Pennsylvania Superior Court agreed with Judge Fitzgerald that the instructions to counsel prohibiting reference to a "redacted statement" as well as the "cautionary" jury instructions provided to the jury cured the "*de minimis*" error presented at trial. The intermediate state court reasoned that:

> Although the conduct of the Commonwealth's attorney here in making reference to the statement as redacted was inexcusable, we are compelled to agree with the trial judge that the effect of this isolated reference, spoken in the midst of a month long trial, was *de minimis.* This is particularly true where the statement as redacted could not be construed as inevitably referring to this defendant. Additionally, the Commonwealth's evidence against [Petitioner] regarding his participation, which included both testimony of the co-conspirator Minh and eyewitness testimony of one of the victims, was overwhelming. Thus, any error was harmless beyond a reasonable doubt.

Resp. Ex. C at 14-15. The state courts' ruling as to Petitioner's redaction claim does not contravene federal law.

The U.S. Supreme Court held, in *Bruton v. U.S.*, that "the Government's introduction of a co-defendant's confession implicating Bruton without the co-defendant taking the witness stand violated the accused's right to confront the witness under the *Confrontation Clause of the Sixth Amendment.*" *U.S. v. Smith*, 2004 U.S. Dist. LEXIS 23358, *5 (E.D.Pa. November 15, 2004) *(citing Bruton v. U.S.*, 391 U.S. 123 (1968)). The U.S. Supreme

Court later decided in *Gray* that "simply replacing a defendant's name with the word 'deleted' (or any other symbol), or merely leaving a blank space, falls within the *Bruton* rule" and, likewise, is a violation of a defendant's Sixth Amendment right to confront witnesses. *Id.* at *8. Petitioner's reliance upon *Gray* and *Bruton*, to argue that the Commonwealth's use of Quang Van Nguyen's redacted statement violated his Sixth Amendment right to confrontation is misplaced. The statements of Quang Van Nguyen and Than Van Tran did not specifically elude to or reference Petitioner and they were read only after cautionary instructions to the jury.[8] Petitioner's assertion that the redacted statement

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[8] Judge Fitzgerald gave the following instruction to the jury before Quang Van Nguyen's statement was read:

The Court: All right. Members of the jury, before Detective Augustine reads the statement in of Quang Van Nguyen, Mr. Krakower's client, please listen carefully to a further instruction from the Court.

A statement made before trial may be considered as evidence only in the case of the defendant who made that statement. In this matter Mr. Quang Van Nguyen and nobody else.

Thus you may consider the statement as evidence against the defendant who made it, Mr. Quang Van Nguyen. You must not, however, consider the statement as evidence against any other defendant.

(Cont'd)

(Cont'd)

> You must not use the statement in any way against any other defendant.

N.T. 2/16/99, p. 135-136. Immediately thereafter, Detective Augustine read Quang Van Nguyen's statement to the jury:

> On the day that it happened I was with my friends. We were in the park across from Veterans Stadium in South Philadelphia. I think it was around three p.m. Minh, that's M-i-n-h, and another guy had guns. We were talking and we all decided that we were going to rob the hooker shop in Chinatown. I then left and went home and took a shower. At about 10 to 11p.m. I left my house and went to a bar in China Town. I'm not sure how you say the bars in English. I stayed at the bar for a long while. After a while Minh and the other guys came into the bar. One of them, I'm not sure who it was, said let's go to the hooker shop. We all left and walked to the hooker shop and one guy looked up at the camera and they buzzed us in.

N.T. 2/16/99, p. 138-139. On February 18, 1999, Detective Baker read Thanh Van Tran's statement to the jury:

> I was asked to take other guys to the massage parlor. Me and some of the other guys we went in first because I was familiar with the parlor. The owner of the massage parlor invited us to a cup of coffee. When we finished half a cup of coffee, the three other guys came in. The owner of the parlor asked them what girls they liked. . . . As soon as Minh came out of the bathroom he shouted everybody lie down on the floor. The security guard saw that Minh came out of the bathroom he shouted everybody lie down on the floor.

N.T. 2/18/99, p. 22.

was prejudicial and directly incriminated him is circumstantial at best. The U.S. Supreme Court has held that "where ascertaining the identity of a co-defendant in a redacted statement requires an inference drawn from linking other evidence to the statement, the risk that the jury cannot follow limiting instructions is not sufficiently substantial to violate the *Sixth Amendment.*" *Priester v. Vaughn,* 382 F.3d 394 (3d Cir. 2004) (*citing Richardson v. Marsh,* 481 U.S. 200, 208 (1987).

The Third Circuit held in *Priester,* that, in a case of multiple defendants, redacted names replaced with "the other guy" or "some other guy" do not arise to a *Bruton* violation, if the redaction does not "unequivocally point" to the defendant. This Circuit has specifically stated that:

> Finally, in this court's *Richards* opinion... there were only three people involved in the case, one of whom was the confessor and one of whom was the co-defendant Richards, and the word "friend" was substituted for Richards' name. *Richards,* 241 F.3d at 341. As the prosecutor called the co-defendant's mother to testify that the confessor and co-defendant Richards were "friends," the word "friend" unequivocally pointed to Richards. In contrast, in this case were there were at least fifteen perpetrators involved in the shooting, and the phrases "the other guy" or "another guy" are bereft of any innuendo that ties them

> unavoidably to Priester. In *Richards*, the replacement was tantamount to explicit reference to the co-defendant.

Priester, 382 F.3d at 400-401. As in *Priester*, Petitioner's trial involved five co-defendants such that the usage of references to "guy" or "guys" in the redacted statement does not "unequivocally point" to the Petitioner.

Furthermore, Petitioner's assertion that mere use of the word "redacted" constitutes a *Bruton* violation lacks merit. When Detective Augustine referenced to the "redacted" statements, Judge Fitzgerald sustained Petitioner's objection and promptly instructed the Detective to refrain from using the term "redacted" in his testimony. N.T. 2/16/99, p. 153. Assuming, *ad arguendo*, Petitioner asserted a valid *Bruton* violation Petitioner, nevertheless must demonstrate prejudice to warrant a reversal of his conviction. The United States Supreme Court has expressly held that "[r]eversal is inappropriate where independent, properly admitted evidence of the defendant's guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Harvey v. Klem*, 2005 U.S. Dist. LEXIS 4836, *29-30 (E.D.Pa. March 28, 2005) (*citing Schneble v. Florida*, 405 U.S. 427 (1972)). The state courts found the testimony of the other eyewitnesses, Minh and Ms. Jackie Kim, overwhelming. This courts review of the record likewise, leads to the conclusion that Petitioner would likely have been convicted, irrespective of the harmless error of referencing the "redacted" statements. The state court's findings conform to federal law, therefore, Petitioner's *Bruton* claim fails.

b. "Organized Crime" Claim

Petitioner alleges that Detective Baker's reference to the "organized crime" unit as the source of Petitioner's photo identification was prejudicial.[9] The Commonwealth counters that a) Judge Fitzgerald cured any potential error caused by this reference and b) "[P]etitioner cannot show any kind of misconduct on the part of the prosecutor for this testimony." Resp't Br. at 20-21.

The Superior Court reasoned that Detective Baker's testimony that Petitioner's picture was provided by law enforcement's "organized crime" unit was not prejudicial and, hence, did not warrant a mistrial. The court explained its ruling:

> In his brief to this Court, [Petitioner] attempts to analogize the facts of this case to the facts in *Commonwealth v. Scarfo*, 611 A.2d 242 (Pa. Super. 1992), *appeal denied*, 535 Pa. 633, 631 A.2d 1006 (1993), wherein this Court

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[9] Petitioner's counseled brief is devoid of any legal argument regarding this claim, but, rather, cites trial testimony and concludes that "[y]our brief writer raised this whole issue anew in a post-sentence motion (N.T. 9/27/99 p. 22-25)." Pet. Br. at 24-28. Since this claim is exhausted, this court will determine its merits.

granted [Petitioner] a new trial based in part on the Commonwealth's repeated references to the defendants as "made" members of the mafia. There are significant differences, however, between the two cases. The trial court in *Scarfo*, in concluding that the Commonwealth's evidence and comments were prejudicial to the defendants' right to a fair trial, specifically stated:

> We noted that eliciting evidence of the mafia and its membership may not be prejudicial. However, the evidence of the mafia relationships in this case is so detailed as to provide that as a requirement to becoming an initiated member one had to participate in a killing. This evidence, along with the testimony that defendants were made members cause[d] the prejudice.

Id. at 273 (*emphasis added*). Thus, the *Scarfo* Court emphasized that it was not the negative reference to "the mafia" by itself that required the grant of a new trial, but was instead the pervasive use of the phrase "made member" coupled with an attempt to invest that phrase with incriminating connotations that caused the prejudice.

The fleeting references of the police detective in this case, however obtuse or precariously intentional, did not approach the nature and

> depth of negative references presented in the *Scarfo* trial. Therefore, we find no basis upon which to grant relief to [Petitioner] on this claim of error.

Resp. Ex. C at 17-18.

This court will uphold the state court's ruling. Judge Fitzgerald cured any prejudicial effect by instructing the jury that "Detective Baker's comment is to be stricken from your mind and from this case. You are not to consider the remark in any manner whatsoever. The remark is not evidence." Pet. Br. at 28 (*citing* N.T. 2/22/99, p. 86); *see also* Resp. Br at 21 (*citing* N.T. 2/22/99, p. 83-84). Moreover, Petitioner has provided no legal precedent for finding Detective Baker's reference to the "organized crime" unit prejudicial to his case. Petitioner briefed this issue before in the Superior Court relying upon the trial transcript to persuade this court that this reference is fatally prejudicial. However, this court cannot find the state court's determination to be violation of any federal law or an unreasonable interpretation of facts. Habeas relief on this claim should, therefore, be denied.

c. Double Jeopardy Claim

Finally, Petitioner asserts that the combined bad faith of the prosecutor and prejudicial testimony of Detective Baker "foreclose retrial" and warrant reversal of conviction, "because due process of the law has been denied." Pet. Br. at 29-30. The Commonwealth retorts that, "since [P]etitioner has failed to show misconduct that would even warrant a new trial, his claim is patently absurd." Resp. Br. at 21. The Pennsylvania Superior Court held that Petitioner was "not entitled to retrial" and refused to address Petitioner's double jeopardy argument in his direct appeal. Resp. Ex. C at 7.

United States Supreme Court and Third Circuit cases draw a distinction between prosecutorial misconduct that "because of its capacity to divert the trier of fact from the task before it, so undermines the reliability of a verdict that it constitutes a due process violation," *Berger v. U.S.*, 295 U.S. 78, 85-88 (1935), *overruled on other grounds*, *Stirone v. U.S.*, 361 U.S. 212, (1960); *Marshall v. Hendricks*, 307 F.3d 36, 63 (3d Cir. 2002), and misconduct that implicates a specific right guaranteed by the Constitution, such as, a violation of the right to counsel, guaranteed by the Sixth Amendment to the United States Constitution as herein alleged (*see* discussion in Ground One, *infra*). Thus, the United States Supreme Court will presume a due process violation when prosecutorial misconduct violates a specific right guaranteed by the Bill of Rights. *See Marshall*, 307 F.3d at 70 (*citing Griffin v. California*, 380 U.S. 609, (1965); *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S.Ct. 2240 (1976); *Hassine v. Zimmerman*, 160 F.3d 941 (3d Cir. 1998)).

For example, a presumptive due process violation occurred where a prosecutor asked the jury to infer a defendant's guilt based on his decision to remain silent, because the Fifth Amendment right to avoid selfincrimination was implicated. *See Marshall*, 307 F.3d at 70-71 (*citing Griffin v. California, supra; Doyle v. Ohio, supra*). The Third Circuit extends this presumption to "other enumerated rights." *Id.* (*citing United States v. Thaame*, 846 F.2d 200 (3d Cir. 1988); *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir. 1973), *cert. denied*, 414 U.S. 855, (1973). Furthermore, while some federal courts of appeal have restricted their review under AEDPA to decisions of the United States Supreme Court only, the Third Circuit has deemed "decisions of federal courts below the level of the United States Supreme Court . . . helpful to us in ascertaining the reasonableness of state courts' application of clearly established United States Supreme Court precedent, as well as "helpful implications" of that precedent." *Marshall*, 307 F.3d at 71 (*quoting Moore*, 255 F.3d at 105, *citing Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3rd Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 824, 145 L.Ed. 2d 62, 120 S.Ct. 73 (1999)).

Initially, this court determines if the alleged misconduct diverted the jury from its task and "so undermine[d] the reliability of a verdict that it constitutes a due process violation." *Marshall*, 307 F.3d at 63. Petitioner alleges that the prosecutor bad faith reference caused him to be convicted despite the "weakness of the case against him." Pet. Br. at 28. The case against Petitioner, however, was substantiated by the evidence presented by the Commonwealth and eye witness testimony. Petitioner's assertion that the prosecutor's conduct deprived him of due process is unsupported. In the contrary the record adequately supports the state court's determination that Petitioner is not entitled to a retrial. Petitioner was given a fair trial and has failed to fully explain how the prosecutor's conduct deprived him of fundamental due process. Therefore, this court finds that the state court's determination of the prosecutorial misconduct challenge, fully elaborated and analyzed, was neither contrary to, nor an unreasonable application of, any federal Supreme Court precedent.

III. CONCLUSION

Petitioner's claims are all unmeritorious. Therefore, this habeas corpus Petition should be dismissed or denied in its entirety. Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 29th of June, 2005, for the reasons contained in the preceding report, it is hereby RECOMMENDED that Petitioner's claims, should be DENIED, because they lack merit. Therefore, no probable cause exist to issue a certificate of appealability.

s/ Carol Sandra Wells
CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — OPINION OF THE COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CRIMINAL TRIAL DIVISION FILED NOVEMBER 10, 2000

COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

JULY TERM, 1997

NO. 0410

COMMONWEALTH OF PENNSYLVANIA

v.

PHU NGUYEN,

Defendant

FITZGERALD, J.
November, 2000

Opinion

The defendant, Phu Duc Nguyen was arrested and charged with the offenses of Murder (for the killing of Mr. Todd Manga) and several counts of Robbery, for the armed Robberies of Ms. Jackie Kim, the manager of a "massage parlor" at 908 Arch Street, Phila. Pa., and several of Ms. Kim's female workers, and Conspiracy. The essence of the theory of the Commonwealth's case was that a group of nine individuals agreed to rob the massage parlor, and, possibly also agreed to shoot, or kill Mr. Todd Manga, who worked as a security guard at the massage parlor.

The defendant Phu Duc Nguyen and four co-defendants (Thanh Van Tran, aka, "Nghia", and, Loc Tran, and Hue Tri Phan, aka "Phan Hue", aka "Tony, and Quang Van Nguyen received a joint jury trial, which commenced on February 3, 1999, and concluded on March 1, 1999.

Following the close of the Commonwealth's case-in-chief, the Court granted defendant Phu Nguyen's motion for Judgment of acquittal as to the charges of Murder of the First Degree, and Conspiracy to Shoot, or kill Mr. Todd Manga. (Order dated February 19, 1999).

The jury subsequently found defendant Phu Nguyen guilty of Murder of the Second Degree, four counts of robbery, and Criminal Conspiracy (objective: to rob Jackie Kim and others, bill 0410, count 14).

The defendant received a sentence of Life Imprisonment for Murder of the Second Degree, and on April 19, 1999, the Court imposed a concurrent sentences of not less than 10 years, nor more than 20 years on the Conspiracy bill, and concurrent sentences of not less than 5 years, nor more than 10 years on the robbery bills.

Thereafter, post sentence motions and supplemental motions were filed, and on September 29, 1999, this court denied all post sentence motions. The within appeal followed.

In Post sentence motions filed by trial counsel, Anthony Jackson, Esquire, defendant, Phu Nguyen alleged that:

1. The verdict was contrary to the evidence;

2. The verdicts were against the weight of the evidence;

3. "The court erred in allowing the Commonwealth to introduce evidence of the defendant's prior convictions and bad acts . . . for the purpose of impeachment when the defendant did not testify.

In supplemental post sentence motions filed by present (appellate) counsel, Ari Moldovsky, Esquire, the defendant alleged that:

4. The Court erred in not granting a mistrial, when the Commonwealth purportedly referred to the "redacted" statement of the co-defendant, (Quang Van Nguyen);

5. Trial counsel was ineffective by ignoring defendant's insistence that he never received a certain traffic ticket in a white, Acura legend automobile, with North Carolina plates, but instead, stipulated that he had received the ticket.

Appendix D

(Summary of evidence)

The homicide victim, Mr. Todd Manga, worked as a security guard at the massage parlor, which was managed by the robbery victim, "Jackie Kim". The three other robbery victims were young women who worked for Kim at the massage parlor.

Mr. Todd Manga was shot and killed when several of the defendant's confederates, acting in concert, surrounded him, while he was shot by one or two of them. Defendant, Phu Nguyen was not alleged to have been an actual "shooter", and his role in the criminal enterprise was to act as a "look-out."

Mr. Minh Nguyen, a confederate of the defendants, entered into a guilty plea agreement with the Commonwealth on April 1, 1997, and subsequently entered guilty pleas to Murder of the Third Degree, Robbery and Conspiracy, before this Court, on April 17, 1997. The memorandum of the agreement ("Exh. C-60") was marked and entered into the record. "Minh" testified that, to his understanding, he was required to testify truthfully, and he understood that his sentence could range from 25 to 50 years. However, no specific sentence was promised, or represented to him, and he understood that the Court would decide on the appropriate sentence (N.T. 2-10-99, pp. 192-194).

Minh provided police detectives with an original statement on October 19, 1995. At that time, according to his trial testimony, he "didn't want to give everybody up," so he provided the detectives with several "fake names" (N.T. 2/10/99, pp. 189-190).

On March 11, 1997, via counsel he gave another statement to detectives at the District Attorney's office, in conjunction with his guilty plea "proffer". At trial, "Minh" characterized the March 11, 1997 statement as being consistent with his trial testimony (N.T. 2/10/99, pp. 191-192).

Minh further testified that he was 21 years old in August, 1995, and had moved to Philadelphia from Maryland, and resided at 1956 Harold Street, after (co-defendant) Quang (Van Nguyen) had invited him to come to Philadelphia. The home at 1956 Harold Street was owned by codefendant "Phan Hue", whom Minh referred to as "Tony". Minh did not pay codefendant "Phan Hue" rent. While in Philadelphia, Minh met all of the co-defendants, and he identified them in court by referring to their photographs (Comm. Exh C-54", N.T. 2-10-99, p. 134).

On a regular basis, Minh and all of the defendants, and unindicted confederates, would frequently visit a park in South Philadelphia, where they would socialize, drink beers and gamble.

On the afternoon of August 3, 1995, Minh went to the park with codefendants, "Phan Hue", and Quang Van Nguyen. Quang drove them to the park in a Mazda. Once at the park, they joined with the defendant, Phu Duc Nguyen, and codefendants Loc Tran and Thanh

Van Tran. Also present with the group at that time, were then unindicted co-conspirators, named, "Hieu", "Chau" and, "Sang" (also known as Diah Sant).

While the group was together in the park, codefendant "Phan Hue", whom Minh referred to as "Tony", spoke to the group about a plan to go to the massage parlor and rob it (NT. 2-10-99, p. 149).

"Phan Hue" discussed a plan to extort money from the owner, under the threat of messing the place up (N.T. 2-10-99, p. 149).

"Phan Hue" stated that he could not enter the massage parlor because the owner knew his face and would not let him in (N.T. 2-10-99, p. 144). He also told the group to demand $500.00 a week (N.T. 2-10-99, p. 144). The group was supposed to scare the owner by messing the place up (N.T. 2-10-99, p. 146).

"Hieu" one of the group who was not on trial, possessed a silver handgun, which Minh described as a .380 automatic (N.T. 2-10-99, p. 146). Codefendant "Phan Hue" told "Hieu" that he was supposed to "take care of the security guard" (N.T. 2-10-99, pp. 149-150).

"Phan Hue" also told Minh that there would be about nine girls at the parlor, and a recording camera.

Later in the evening, after the group had eaten dinner, and had visited a karaoke bar, co-defendant, "Phan Hue" personally drove Minh and "Hieu" and co-defendant Loc Tran to the massage parlor in his (Phan's) Toyota Van. (N.T. 2-10-99, p. 150.). When they arrived at the scene, Minh, "Hieu" and Loc Tran went into the parlor on the building's second floor, after being "buzzed" through the door by someone inside. Three others from the group were already inside the parlor, being, codefendant Thanh Tran (Nghia), codefendant Quang Van Nguyen (Quang), and "Chau".

The defendant, Phu Duc Nguyen, and Diah Sant, aka, "Sang", and codefendant "Phan Hue" stayed outside. They were to act as "lookouts". Subsequently, defendant, Phu Duc Nguyen did enter the premises to warn the others that a "customer" was coming (N.T. 2-10-99, pp. 150-153).

Once inside, the various members of the group sat about, and after several minutes, the manager, or owner, Ms. Jackie Kim told them that if they were not going to pick any girls that they would have to leave. Everyone in the group stood up and walked towards the door where the security guard, Mr. Todd Manga was standing. At that time, a struggle ensued, and gunshots were fired. Minh thought that everyone was trying "to get the security guard or something" (N.T. 2-10-99, p. 157). "Hieu" stood behind the guard and codefendant Thanh Tran (Nghia) stood in front of the guard. Codefendant, Thanh Tran possessed a black handgun, and "Hieu" had a silver gun (N.T. 2-10-99, p.160). Both Thanh Tran and "Hieu" fired their respective weapons. The rest of the group sat down, and codefendant Thanh Tran ran down the steps and brought Jackie Kim, who had been trying to flee, back into the parlor (N.T. 2/10/ 99, pp. 159-163).

Prior to the incident, codefendant "Phan Hue" had told the group that they were to do whatever Thanh said (N.T. 2-10-99, p. 163).

After Mr. Todd Manga was shot, the individual girls were taken to their respective rooms and robbed. Various members of the group performed different tasks. Codefendant, Thanh Tran, (Nghia) took girls upstairs to their rooms. Codefendants Quang Van Nguyen and Loc Tran searched a room downstairs, and Quang returned to the parlor with a camera video-tape. Minh and "Chau" stayed in the parlor and watched the girls who had not yet been taken to their respective rooms, and Minh also went upstairs to search for any missing girls. Throughout the incident, codefendant Thanh Tran brandished his weapon and demanded money from the various girls and a customer.

At one point, the defendant Phu Duc Nguyen, who had been acting as a look-out, came into the stairway area and warned the group of an approaching customer. The customer was allowed in, and money and jewelry were taken from him. Money and jewelry were also taken from a customer who had been in the parlor when the group arrived. At one point, "Chau" had sex with one of the girls (N.T. 2-10-99, pp. 164-169).

The entire criminal incident took about two hours. Before the group left, Minh handcuffed Jackie Kim inside a closet, with handcuffs taken from the body of Mr. Manga by "Hieu", who also took Mr. Manga's gun; and the young women were told to undress, and they were then tied up with telephone wire.

After the incident, Minh and the others, excepting "Phan Hue" returned to the house on Harold street, owned by 'Than Hue". Minh testified that the defendant, Phu Duc Nguyen drove them there in a car, which Minh described as being a "white, Accura Legend".

Codefendant "Phan Hue" was not outside when the group left the parlor, and he was not at the house on Harold Street when the group returned to the house.

At the house on Harold street, the defendant Phu Duc Nguyen and codefendant, Thanh Tran divided the proceeds from the robberies between the various members (N.T. 2/10/99, p. 178). Everyone then left the house, except for Minh and co-defendant Quang Van Nguyen.

Minh met codefendant, "Phan Hue" the next morning in a restaurant, along with co-defendant, Quang Van Tran and Quang Van Tran gave " Phan Hue" an envelope and said here is your money (N.T. 2-10-99, pp. 180-181).

Minh was subjected to extensive cross examination by counsel for all of the codefendants.

Under cross examination, Minh testified that he had not known codefendant "Phan Hue" prior to coming to Philadelphia. He admitted that he was drinking alcohol when the "plan" was discussed at the park, and continued drinking later in the evening. He testified that when co-defendant "Phan Hue" discussed the "plan", he did not mention "guns", and he never specifically mentioned "rob the girls", but talked about $500.00 in "extortion" money, and did not discuss dividing any monies between the various confederates (N.T. 2-11-99, pp. 51-57).

Minh was impeached by his statements on his bail application, wherein he stated that he resided on Emerald street. He explained that the house on Harold street was actually near the intersection of Harold and Emerald streets, and that he had been confused.

He was questioned about an assault conviction which resulted from charges that he assaulted and kidnaped a 16 year old female and transported her to Philadelphia from Virginia.

He admitted to lying when making his first statement to detectives after his arrest.

He acknowledged that when negotiating with the Commonwealth, he was aware that he faced a first degree murder charge with a possible sentence of death. He also admitted to knowledge during negotiations, that the robbery victim, "Jackie Kim" had identified him as possessing a gun, and striking her (N.T. 2-12-99, p, 105).

He acknowledged that although he could be subjected to a "mandatory" sentence on the robbery bill to which he pleaded guilty, the agreement with the Commonwealth was silent on the mandatory sentencing provisions, and that he was hoping for a sentence of less than five years.

Prior to the defendant's trial, Minh had written a letter to this Court, wherein he sought to withdraw his guilty plea. This document was disclosed to all parties prior to trial. Under cross examination, Minh was questioned about this statement (the letter, Defense Exhibit, "D-14", N.T. 2-11-99, pp. 76-77). Minh testified that after he entered his guilty plea, upon reflection, he did not think that he was guilty of third degree murder, because he did not actually kill anyone (N.T. 2-11-99, PP. 77-78).

Minh admitted to not mentioning codefendant, "Phan Hue" in his first statement given to the police in October, 1995 (Defense Exhibit, "D-9"), and admitted that in the statement, he did not mention that "Phan Hue" planned the robberies. He also admitted that he remained silent at the preliminary hearing, when the untruthful statement was admitted into evidence (N.T. 2-11-99, pp. 78-80).

Minh also testified that he had met defendant Phu Nguyen prior to the date of the incident and had met him in the park previously, and that the defendant had a car (N.T. 2/10/99, p. 135). He particularly identified the defendant, Phu Nguyen as being present in the park when the group discussed going to the massage parlor, and that the defendant could not enter the parlor because he would have been recognized (N.T. 2/10/99, p. 144). He also stated that defendant Phu Nguyen drove Thanh Van Tran ("Nghia"), Quang Van Nguyen, and "Chan" to the parlor in a "Acura Legend" automobile, which he believed was owned by the defendant Phu Nguyen (N.T. 2/10/99, p. 150). He stated that while the group was inside the massage parlor, the defendant, Phu Nguyen came inside, onto the stairway and told them that a customer was coming (N.T. 2/10/99, p. 152-153).

Under cross examination by defendant Phu Nguyen's trial counsel, Anthony Jackson, Esquire, Minh testified that his initial statement to detectives, on October 19, 1995, (Exh. D-9) was not a totally truthful statement. In the statement he said that a blue Chevy Van had been used. Under cross examination he testified that it was true that one of the codefendants did own a blue chevy van, but it was not used in the robbery. He testified again that the group left the scene in an Accura Legend (2/11/99, pp. 35-36), and he agreed that when he gave the October 19, 1995 statement, that he omitted naming the people who were outside the parlor during the incident (N.T. 2/11/99, p. 38).

Counsel for defendant Phu Nguyen also questioned Minh concerning a statement made to the District Attorney's office detectives on March 11, 1997 (Exh. D-10) wherein he stated that the defendant Phu Nguyen had come up the stairway to warn the group that a customer was coming. He testified that the doorbell rang, and that Thanh Tran (Nghia) buzzed the door open and told Minh to see who it was and that the defendant Phu Nguyen then came in before the customer and told Nghia that a customer was coming, but that Phu Nguyen never came up to the door (N.T. 2/11/99, pp. 41-50).

On redirect examination, Minh testified that the defendant, Phu Nguyen used an Accura Legend when they drove to the parlor on Arch Street. (2/12/99, p.12), and that "Tony" ("Phan Hue") told Phu Nguyen to stay outside and wait and watch out (N.T. 2/12/99, p.28), and he later described the Accura Legend as being "white" in color, with North Carolina plates (N.T. 2/12/99, p. 76).

Commonwealth witnesses, Jackie Kim, Irene Wong, Lisa Lee, and Nina Lee, all testified to being in the massage parlor during the incident, and to being forcibly robbed. Jackie Kim testified to having $1,000.00 taken from her purse (N.T., 2-5-99, p. 107). Irene Wrong testified that after codefendant, Thanh Van Tran had fired a shot, he took her to her room on the third floor, and stated that if he did not get money, he would kill everyone, and she gave him $3,000.00. Some of her money had been in her pants pocket, and other money was under her bed (N.T. 2-8-99, pp. 22-24). Lisa Lee testified that she was in a room on the third floor, with another girl, Sara, and codefendants Thanh Van Tran and Loc Tran, entered the room and Thanh Van Tran had a gun, and asked for money and took her to her own room, and she gave him $1,000.00 (NT. 2-9-99, pp. 17-22). Witness, Nina Lee testified that one of the men took her from the parlor on the second floor, to her room on the third floor and stated that if he did not get $10,000.00 that night, he would shoot all of them, and that she gave him $400.00 (N.T. 2-10-99, pp 56-57).

"Lisa Lee" (Suwanee Saepang) also testified that she worked at the parlor, and was in the back of the third floor, when she heard gunshots. She ran to her own room , No. 8 on the 3rd floor, and was joined by a friend, Sara. Lisa Lee was able to look out of her window and observe the defendant, Phu Duc Nguyen on the street corner below. She identified the defendant at trial (N.T. 2/9/99, pp. 11- 15). She had previously identified him at a photographic array in Chicago, and during the incident, she was able to observe him when he came inside and up the stairs and told his confederates to "hurry up" (N.T. 2/9/99, pp. 15-16).

Lisa Lee also testified at a preliminary hearing for defendant Phu Duc Nguyen, and other codefendants on July 10, 1997. And the Commonwealth stipulated that at the preliminary hearing, the defendant, Phu Duc Nguyen was present as a defendant, at the bar of the court, and that Ms. Lisa Lee, a witness at that time, did not identify him (2/9/99, pp. 133-135).

On cross examination by MY Anthony Jackson, Esq. Attorney for defendant Phu Duc Nguyen, Ms. Lee admitted to giving a statement to Phila. Police Detective Harris on August 8, 1995, (Exh D-5) and to signing the statement. At that time she stated that she observed four (4) of the men who were involved in the robberies.

At trial she testified that she did see someone outside, but when she told the detective that she saw four men, she was speaking of four men whom she saw inside, downstairs, when she first looked downstairs (N.T., 2/9/99 pp., 117-125).

She testified under cross examination that she saw the defendant outside the massage parlor (on the street outside), and again when he came "inside and got upstairs" (N.T., 2/9/99, p.144). She testified that she may have forgotten to tell Detective McCarthy, in her statement of April 12, 1997 (Exh. "D-6"), that he came up the stairs (N.T. 2/9/99, p.155). She also admitted that she had not told detectives or attorneys from the District Attorney's office that she had seen the defendant about seven months after the incident, at another massage parlor (N.T. 2/9/99, pp.141-144).

On redirect examination, Lisa Lee testified that she identified the defendant Phu Duc Nguyen, from about forty (40) photographs, as the man she saw outside and again when he came inside to warn his friends, when she was interviewed by Investigator McCarthy on April 12, 1997 (NT, 2/9/99, pp. 203-205).

Under further cross-examination, Lisa Lee testified that she saw the defendant for about five minutes when he was outside, and for two to three minutes when he was inside (NT, 2/10/99, pp. 11-18): She again admitted that she did not identity the defendant Phu Nguyen at the Preliminary Hearing, and it was again stipulated by the Commonwealth that Lisa Lee did not identify the defendant at the preliminary hearing. (NT, 2/10/99, p.22).

Ms. Kim J. Venema, (Jackie Kim) initially attempted to identify the defendant, Phu Nguyen, when she made a general statement identifying all of the defendants except for Hue Phan as being participants in the robberies. (N.T., 2/5/99, p. 135). However, on cross examination she admitted to confusing defendant Phu Nguyen with another person who had struck her, and she admitted that the defendant did not strike her, and she could not say that the defendant was inside the massage parlor during the criminal incident (N.T. 2/5/ 99, pp. 211-213).

(Discussion)

The defendant's claims that the verdicts were contrary to the evidence or the weight of the evidence are without merit.

It is well established that the determination of credibility of witnesses are within the province of the jury. "It is well within the ordinary capacity of a jury to assess whether a particular witness is lying." (Commonwealth v. Davis, Pa., 541 A.2d 315 (88). Also, in the instant case, the Court correctly charged the jury that it must consider the witness Minh Nguyen to be a "corrupt source" and likewise instructed the jury on how to evaluate testimony given by a "corrupt source".

Appendix D

The evidence established the existence of the conspiracy to rob the victims, beyond a reasonable doubt. The law imposes upon a conspirator full responsibility for the natural and probable consequences of acts committed by fellow conspirators, if such acts are done in pursuance of the common design or purpose of the conspiracy. Such responsibility attaches even though the conspirator was not present when the acts were committed by the fellow conspirators. Commonwealth v. Spardue, Pa., 122 A2d 161; Commonwealth v. Ellis, Pa, 301 A2d 651 (73).

Where homicide is a charged offense, a co-conspirator may be liable under the "felony-murder" rule. Under the common law doctrine, the malice necessary to make a killing murder, is constructively inferred from the malice incident to the perpetration of the initial felony.

However, Pennsylvania appellate courts have required that the killing be in furtherance of the underlying felony and not merely coincidental. Also, a killing cannot be felony murder where the intent to commit the felony is not formulated until after the conduct causing death has occurred. Additionally, even where two felons act in concert, and are still present at the scene of the crime, one felon will not be charged with imputed malice where the homicidal act of his co-felon was not directed towards carrying out the particular felony or felonies with which the non-slaying felon is charged (Comm. v. Waters, Pa., 418 A.2d 312 (80)).

In the instant case, the evidence adduced at trial supports the inference that Mr. Manga, the homicide victim, was killed in order to facilitate the robberies of Jackie Kim, and the employees of the massage parlor. (See, Comm. v. Olds, Pa.Superior, 469 A.2d 1072, at 1076-1077, and cases cited therein). The robberies, and the use of weapons were discussed at the park, prior to the commission of the crimes. The defendant actively participated by entering the agreement to commit the robberies; by driving some of the co-felons to the parlor; by acting as a "lookout"; by warning his co-felons; by aiding them in the escape from the scene; and by actually distributing proceeds from the robberies after the commission of the crimes.

Additionally, the totality of the evidence supported the Second Degree Murder and Robbery convictions of the defendant, Phu Nguyen under the theory of accomplice liability. The Pennsylvania Crimes Code imposes criminal liability where the offense is committed by the actor, or by the conduct of another person for which he is legally accountable, or both (18 Pa.C.S.A. #306, "Liability For Conduct of Another; Complicity). The particular provision imposes criminal liability for the conduct of another person, when the actor "is an accomplice of such other person in the commission of the offense." [18 Pa. C.S.A. # 306 (b) (3)].

An "accomplice" is defined as: "A person is an accomplice of another person in the commission of the offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it . . ." (18 Pa. C.S.A. #306 (c) (1), (i), (ii).

In the instant case, the evidence established beyond a reasonable doubt, that the defendant aided the others in committing the offense(s) of robbing the occupants of the massage parlor. Again, the evidence also established beyond a reasonable doubt that the actual killing of Mr. Manga was in furtherance of the planned robberies. Accordingly the evidence was sufficient to sustain the verdicts beyond a reasonable doubt.

The defendant's contention that the verdicts were against the weight of the evidence is also without merit. Before a new trial can be awarded on the grounds that the verdict is against the weight of the evidence, it must appear from the record that the verdict was so contrary to the evidence as to shock one's sense of justice and to make the award of a new trial imperative. Comm. v. Carlitz, Pa. Superior, 466 A.2d 696 (83). In the instant case, co-felon "Minh" testified as to the plan, agreed to by the defendant, to rob the manager and workers of the massage parlor, and the defendant's active participation. And, Minh's testimony was corroborated by Lisa Lee who identified the defendant as being the "look-out".

The defendant's contention that the Court erred in allowing the Commonwealth to introduce evidence of the defendant prior "bad acts" for the purpose of impeachment, when the defendant did not testify, is also without merit.

This allegation of error, as contained in defendant's original post sentence motions, is not specific. This Court notes that the defendant did not testify at trial, but evidence was admitted during the Commonwealth's case-in-rebuttal, as to the defendant's receiving a traffic ticket, for operating a "white Accura Legend" automobile.

In the instant case, the defendant offered the defendant's adopted mother, Ms.. Sami Buisson-Daniel as a defense witness. Ms.Buisson-Daniel testified that for a period of time, in 1995, the defendant worked at a Yarn company in North Carolina, but that he mainly lived at her home (N.T. 2/19/1999, p. 31). She testified that she did not know what kind of car the defendant owned in 1995, but that he had a red, maroon car, and a black Nissan. She testified that she never known him to own a white car, or an Accura Legend, and never knew him to drive an Accura Legend, and never knew him to drive a car with a North Carolina plate (N.T. 2/19/99, pp. 33-38).

On rebuttal the Commonwealth sought to introduce evidence of the defendant's operation of a white Accura Legend on more than one occasion. On one occasion the defendant was purportedly with codefendant

Thanh Tran. After discussion with the Commonwealth and the defendant, counsel for the defendant agreed to a stipulation. By stipulation, the Commonwealth introduced evidence in rebuttal, that the defendant Phu Nguyen received a traffic citation, (No. D0161238-0, Exh. C-68) issued on November 25,1995, in Philadelphia, for driving through a "stop" sign, and was driving "a white Accura Legend" with a 1995, North Carolina license plate (HYY1063), and provided an address of 1095 Sunset Drive, Cherryville, North Carolina, 28021. (N.T. 2/22/99, pp 111-112).

The evidence of the traffic citation was not evidence of the defendant's guilt of another crime so as to prejudice him by showing him to be a person of bad character, and the evidence was relevant to the issue of whether the defendant operated or had access to a white Accura Legend automobile. (See, Comm. v. Lark, Pa., 543 A2d 491 (88). Further, the evidence was introduced during the Commonwealth's case in rebuttal after the defense introduced evidence tending to prove that he did not own, drive or have access to a white Accura Legend automobile.

Evidence is admissible to contradict that offered by a defendant, or his witnesses, even though by doing so the Commonwealth supplies previous omissions from its case in chief. The order of presentation of evidence is a matter of sound discretion for the trial court. Comm. v. Mangini, Pa., 416 A.2d 986 (80).

Likewise, counsel for defendant was not ineffective for stipulating to the evidence of the traffic stop of the defendant on November 25, 1995. On September 27, 28, and 29, 1999, and evidentiary hearing was held on defendant's post sentence motions. The Court issued Findings of Fact and Conclusions of Law and found that the defendant, after consultation with counsel, freely, voluntarily and knowingly agreed to the stipulation. (Order Denying Post Sentence Motions entered 9/29/99).

Finally, the Court did not err in denying a defense request for a mistrial after the Commonwealth referred to a "redacted" statement by the co-defendant, Quang Van Nguyen.

Prior to trial, statements given to the police by any of the defendants were redacted so as delete any reference to a codefendant. On direct examination of Detective Thomas Augustine, the prosecutor, prior to the reading of the statement, the prosecutor asked the detective if he had a copy of the redacted statement, and the witness answered yes. (N.T. 2/16/99, p.130.) Following immediate objections a side bar conference was conducted. The Court instructed all parties to not mention the specific word "redacted", and informed counsel that it would give the jury an immediate cautionary instruction, and denied motions for a mistrial. (N.T. 2/16/99, pp 131-133). Thereafter, the Court did instruct the jury that the codefendant, Quang Van Nguyen's pre trial statement was evidence only against him, and was not evidence against any other defendant, and could not be considered in any way, against any other defendant (N.T. 2/16/99, p. 136).

Further, the passing reference to a redacted statement was de minimis, and any error was cured by the Court's cautionary instruction to the jury after the statement was read to the jury (N.T. 2/16/99, p. 136). Additionally, the statement, as read to the jury, mentioned "other guys" as opposed to "X", "Y", or "Z" so as to minimize any contextual implication problems. In summary; the reference did not require the drastic remedy of a mistrial. (See, Comm. v. Rainey, Pa., 656 A2d 1326, at 1331-1333, and fn. 5, at 1332, (95).

In conclusion, the evidence supported the jury's verdicts beyond a reasonable doubt. He received a fair trial, and his claims of error are without merit.

BY THE COURT,

s/ James J. Fitzgerald, III
JAMES J. FITZGERALD, III

APPENDIX E — COPY OF TICKET AND OTHER DEFENSE EXHIBITS FROM THE POST-SENTENCE HEARINGS

Best Available Copy

COMMONWEALTH OF PENNSYLVANIA

PHILADELPHIA TRAFFIC COURT
P.O. BOX 12806
800 SPRING GARDEN STREET
PHILADELPHIA, PA 19106-0806

TRAFFIC CITATION

CITATION NO. 0161238-0

SOCIAL SECURITY NUMBER 18 7 662 0 [illegible]

1. 9931180
2. C.D.L. ☐
3. STATE ☐ PA NC
4. D.O.B. 5-16-69
5. SEX ☒ ☐

6. DEFENDANT NAME - FIRST CHU DUC MIDDLE LAST NGUYEN

7. DEFENDANT STREET ADDRESS 1095 SUNSET DR.

8. CITY CHERRYVILLE 9. STATE ☐ PA NC 10. ZIP CODE 28021

11. OWNER'S NAME

12. OWNER'S ADDRESS

13. VEHICLE PLATE NO. HYY1063 14. REG. YR. 95 15. STATE ☐ PA NC 16. MAKE ACURA 17. TYPE LEGEND 18. COLOR WHT.

19. VEHICLE PLATE NO 20. REG. YR 21. STATE ☐ PA 22. MAKE 23. TYPE 24. COLOR

25. CHARGE - UNDER TITLE 75 PA VEHICLE CODE

(A) 1301A Unregistered Vehicle	(G) 1543A License Suspended/Revoked	(M) 3331C Prohibited Turn
(B) 1309 Fail Renew Registration	(H) 1574A Permit Unauthorized Driver	(N) 3712A Abandoned Vehicle Highway
(C) 1311B Fail Carry Registration	(I) 1786F Required Financial Responsibility	(O) 3714 Careless Driving
(D) 1372(3) Unlawful Plate Display	(J) 3112A3I Disregard Red Signal	(P) 4581A2 Seat Belt Required
(E) 1501A Unlicensed Driver	(K) 3308B Wrong Way - 1 Way	(Q) 4703A Valid Inspection Certificate
(F) 1511A Fail Carry License	[✓ (L) 3323B] Disregard Stop Sign	(R) 6308A Police Investigation

SEE BACK OF DEFENDANT'S COPY FOR BREAKDOWN OF TOTAL DUE.

OTHER CHARGES 26. ☒ Vehicle Code ☐ Ordinance
27. SECTION/SUB SEC. (If not listed above)
90.50

29. CHARGE (If not listed above)
☐ Fees on Information Received

30. NATURE OF OFFENSE Disregard Stop Sign

31. SPEED TIMED 32. SPEED ALLOWED 33. WEIGHT PERMITTED lbs. 34. ACTUAL VEHICLE WEIGHT lbs.

35. FOLLOWED 36. TIMED 37. TIMED 38. SPEED DEVICE, SERIAL NO 39. SPEED DETECT. EQUIP. TYPE 40. LAST EQUIP. TEST

41. DATE EQUIP. TEST 42. ACC ARREST ☐ YES 43. LOCATION OF OCCURRENCE Sepviva & York

44. DISTRICT 26 45. NO 46. 47. WEATHER CONDITIONS Clear 48. OFFENSE DATE 11-25-95 49. DAY SAT 50. TIME 1:45

51. DEFENDANT SIGNATURE - ACKNOWLEDGES RECEIPT OF CITATION X [illegible] 52. DATE 11-25-95 ☐ ISSUED ☐ FILED

53. I verify that the facts set forth in this citation are true and correct to the best of my knowledge, information and belief. This verification is made subject to the penalties of Section 4904 of the Crimes Code (18 Pa. C.S.A. § 4904) relating to unsworn falsification to authorities.

OFFICER'S SIGNATURE Otto Koladi BADGE NO. 2167

54. STATION/ASSIGNMENT Frankford Squad 55. DIST. NO. 25TH

56. LAW ENFORCEMENT AGENCY ☐ ☐ ☐ Phila. Police ☐ PennDOT ☐ ☐ ☐ Other

57. 75 Pa. C.S.A. § 1534 VIOLATION JUVENILE Parents Notified ☐ YES ☐ NO
58. COMM VEH. ☐ YES 59. HAZ. MAT. ☐ YES 60. ☐ MARRIED ☐ UNMARRIED

61. REMARKS Above Def was observed by Police Disregard the Stop Sign at Sepviva & York Sts

1 2 2 2 1 3 5

62. SECTION 3323 63. SUB SEC. B 64. DATE 11-25-95 ☐ ISSUED ☐ FILED

NOTICE

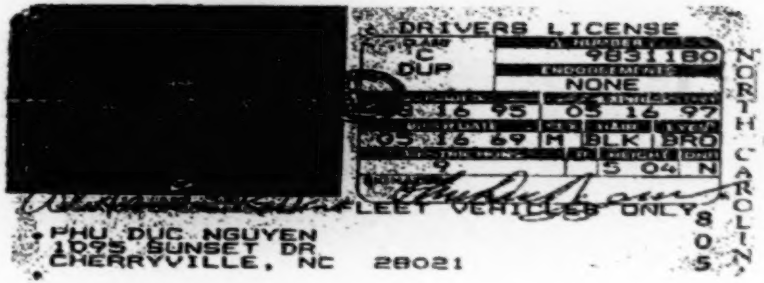
If you plead guilty or are found guilty, points may be assessed against your driver's record. Accumulation of 11 or more points will result in the suspension of your driving privilege. Also, your driving privilege WILL BE SUSPENDED if you plead guilty or are found guilty of certain offenses under the Vehicle Code, including but not limited to, driving while operating privilege is suspended or revoked, racing on highways, fleeing or attempting to elude police, driving without lights to avoid identification or arrest, accidents involving damage to attended vehicles or property, failure to stop for school bus with flashing lights, or subsequent convictions related to drivers required to be licensed.

AOPC 406A-95
7-147 (Rev. 1/95)

0161238-0

A67

PS-D-6



DRIVERS LICENSE

NORTH CAROLINA

CLASS	NUMBER		
C DUP	9831180		
	ENDORSEMENTS		
	NONE		
3 16 95	05 16 97		
	SEX	HAIR	EYES
05 16 69	M	BLK	BRO
RESTRICTIONS		HEIGHT	
9		5 04	N

FLEET VEHICLES ONLY

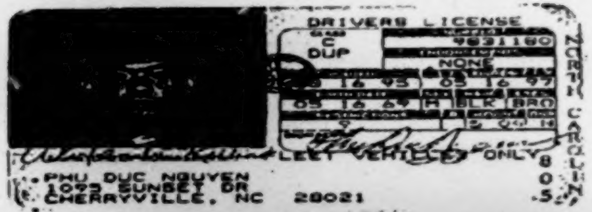
805

PHU DUC NGUYEN
1095 SUNSET DR
CHERRYVILLE, NC 28021

A68

Money24
PHONETELLER 24
HONOR
PLUS

Motor Vehicle Services NEW JERSEY
VEHICLE REGISTRATION
PLATE NO:FWG24E GOOD THRU:04/91
VIN: JAABL01E4L5852201
ISU 90 WAGON RD AMI WC:7
PHU D NGUYEN PASSENGER 07
RR#2 BOX 200 DL:N3121-62964-05692
EGG HARBOR NJ 08215-9726 INI
EQ:7 FEE: 27.50 RK HH901150170

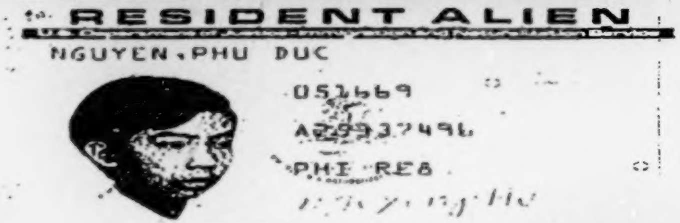


DRIVERS LICENSE
C
DUP
9031180
NONE
05 16 95 | 05 16 97
05 16 69 | M | BLK | BRO
LEET VEHICLES ONLY
PHU DUC NGUYEN
1075 SUNBET DR
CHERRYVILLE, NC 28021
NORTH CAROLINA
805

SOCIAL SECURITY
187-62-0481
PHU DUC NGUYEN
Nguyen-Duc-Pho

PSD;

Mellon PSFS



RESIDENT ALIEN
NGUYEN,PHU DUC
051669
A29937496
PHI RE8

PS-D-7

2/97 Def. Ro. Collingdale Police A69
photocopies of ID cards when they
[illegible] photographed [illegible] of them
[illegible]

PS D-2

NORTH CAROLINA DIVISION OF MOTOR VE
REGISTRATION CARD

MVR-1
(Rev. 11/91)

Plate Expires ____
Plate Valid Thru ____

FOR DMV USE ONLY | Date

Year	Make	Body Style	Series Model
89	Acura	26	Legend

Vehicle Identification Number: JH4KA3267KC012073
Type of Fuel: [illegible]

Full Name(s) of Owner(s) (First, Middle, Last) (Print In Ink or Type): Khang Phuc NGuyen

Check When ☐ One Name ☐ Initial Only
Check When ☐ One Name ☐ Initial Only

Residence Address (Individual) Business Address (Firm): 150 East Allens Mobilehome PK
City and State: Cherryville, N.C
Property Tax Declaration
Zip Code: 28021
County: [illegible]
Municipality:
Mail Address (if different from above):
Owner's Signature:

Title Number ____
Plate #: HY Y1063
Sticker #: 3415011
Classification: [illegible]
Gross Weight:
Annual Fee: 50
Branch #/Agent: 1A06
Date/Time: [illegible] 12 95

License
MSI
Title
Special Title
Registration
Late Pen./Misc.
Use Tax
Lien Rec.
Rest.
Service
Per/Spec./Desi.
Pen (overwt.)
Collegiate
Transit Authority
Sub-Total
Notary
Total

OWNER'S CERTIFICATION FOR ELIGIBILITY

I CERTIFY FOR THE MOTOR VEHICLE DESCRIBED ABOVE THAT:

1. I have financial responsibility as required by law.
Atlantic Casualty Insurance
Print or type full name of insurance company authorized in N.C.—not agency or group
1231881
Policy Number—if policy not issued, name of agency binding coverage
2. I owe no delinquent county or municipal taxes on this vehicle.
3. I was the legal owner of this vehicle on January 1st of the year of his application and the vehicle was listed for property taxes
in ____ (County) in ____ (Month) (Year)
4. I was not the legal owner of this vehicle on January 1st of the year of his application. ☐ (CHECK BLOCK)

Check Appropriate Block/s

☐ Title Only—Vehicle Not in Operation.
☒ Title and License
☐ Exchanged Plate No. ____
☐ Plate No. Transferred ____
Sticker No. ____
Expiration Date ____
☐ Replaced Plate No. ____

DMV VALIDATION
CHECK ____
[illegible] 13 [illegible]
CASH ____
BRANCH 122

ODOMETER READING

DO NOT DESTROY

Not in Book

Best Available Copy